rate from the 9th day of [2] November, 1931, together with her costs herein, and for such other and further relief as to the court may seem just.

WRIGHT & WRIGHT & LARSON,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco.—ss.

Alice A. Aschenbrenner, being first duly sworn, deposes and says:

That she is the plaintiff in the foregoing action; that she has read the complaint and knows the contents thereof, and same is true of her own knowledge, except as to those matters therein stated on information or belief, and as to those matters that she believes it to be true.

ALICE A. ASCHENBRENNER.

Subscribed and sworn to before me, this 22nd day of January, 1932.

[Notarial Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County of San Francisco, State of California.

State of California,
County of San Mateo.—ss.

I, E. B. Hinman, County Clerk of the above entitled County, and ex-officio Clerk of the Superior Court thereof, do hereby certify that the foregoing is a full, true and correct copy of the

Copy of the Application for this Policy.

I hereby apply to the United States Fidelity and Guaranty Company for a Policy to be based upon the following representation facts: I understand and agree that the right to recovery under any policy which may be issued upon the basis of this application shall be barred in the event of any one of the following statements, material either to the acceptance of the risk or to the hazard assumed by the Company is false, or in the event that any one of the following statements is false and made with intent to deceive. I agree that this application shall not be binding upon the Company until accepted either by the Secretary at the Home Office or by an agent duly authorized to issue policies.

My full name is WALTER JOHN ASCHENBRENNER

My residence is

No. 6424 Hillegass Ave., City of Oakland State of California.

I was born on the 4th day of December at Council Bluff

My age is 28 years. My height is 5 feet 7½ inches. I weigh 140 pounds. I am white.

I am with Pacific Radio Trade Assn.
(Name of Employer).

whose business is Association. Located at

905 Mission Street, City of San Francisco State of California.

My occupation is Manager

The duties of my occupation are fully described as follows: Office duties.

7. My average weekly earnings from the occupation stated above exceed the total amount of single weekly indemnity under this and all other policies carried by me, *except as follows.* No exceptions

8. Policy to be payable in case of death by accident under its provisions to { Beneficiary's Name in full ALICE A. ASCHENBRENNER
Residence Same Relationship Wife Age

9. I have no Accident Insurance or Health Insurance in this or any other Company, except as follows: No exceptions
(The name of the company and amount in each to be stated above.)

10. No application ever made by me for Accident, Health, or Life Insurance has been declined, or notice of action withheld, nor has any such policy of insurance been cancelled or renewal refused, except as herein stated: No exceptions

11. I have never received indemnity for accident or illness, except as herein stated: No exceptions

12. I have not in contemplation any special journey or any precarious undertaking, except as herein stated: No exceptions

13. My habits of life are correct and temperate; I am in sound condition mentally and physically; my hearing or vision is not impaired; I have never had nor am I now suffering from or subject to fits, disorders of the brain, or any bodily or mental infirmity or deformity (including hernia and rupture)—except as herein stated: No exceptions

14. I have not been disabled and have not received medical or surgical attention during the past five years, except as herein stated:

Date.	Ailment.	Duration.	Indemnity.	Company.
		No exceptions		

15. I have never undergone surgical operation—except as herein stated. Date No exceptions

For Result

Policy applied for this 1st day of September, 19 28

Signature of Applicant WALTER JOHN ASCHENBRENNER

STATE OF CALIFORNIA
COUNTY OF SAN MATEO, } ss.

I, E. B. Inman, County Clerk of the above entitled Court and ex-officio Clerk of the Superior Court thereof, do hereby certify that the foregoing is a full, true and correct copy of the original on file in my office, and that I have carefully compared the same with the original.

Witness my hand and seal of said Superior Court this 12 day of March 1932

E. B. INMAN
County Clerk and Ex-Officio Clerk, Superior Court

By _____ Deputy Clerk.

This Policy Provides Indemnity for Loss of Life, Limbs, Sight, Speech, Hearing or Time Due to Accidental Bodily Injuries to the Extent Herein Provided.

C 555-28

No. PA-47882

THE PILOT ACCIDENT POLICY

Homer T. Miller Co.
Insurance
Central Bank Bldg.,
Oakland

Insurance Exchange Bldg.,
San Francisco

United States Fidelity and Guaranty Company

TO

WALTER JOHN ASCHENBRENNER

_____

United States Fidelity and Guaranty Co.

BALTIMORE, MARYLAND

R. HOWARD BLAND, President

DIRECTORS

SIDNEY W. BLAND, Assistant Manager, Toronto, Canada.
J. KEMP BARTLETT, Vice-President and General Counsel.
J. KEMP BARTLETT, JR., Attorney-at-Law.
R. HOWARD BLAND, President.
J. P. BUTLER, President Canal Bank and Trust Co., New Orleans, La.
LEROY W. CAMPBELL, President The City Bank and Trust Co., Hartford, Conn.
PHILIP A. CARROLL, Shearman and Sterling, New York, N. Y.
ALLAN L. CARTER, Benzol Chemical Co.
W. F. CARTER, Carter, Jones & Turney, St. Louis, Mo.
THOMAS E. COTTMAN, President Cottman Company.
HENRY V. CUNNINGHAM, President Union Savings Bank, Boston, Mass.
E. J. CURTIS, Curtis Bros., inc., Clinton, Iowa.
E. ASBURY DAVIS, F. A. Davis & Sons.
PHILIP DE BONDE, President Oriental Navigation Co., New York, N. Y.
JOHN M. DENNIS, President Union Trust Company.
WILLIAM A. DIXON, President Dixon-Bartlett Company.
RONALD A. FOSTER, Manager, Indianapolis, Ind.
R. WALTER GRAHAM, Mayer, Fitts & Co.
FELIX E. GUNTER, President Liberty Central Trust Co., St. Louis, Mo.
SIDNEY HALL, Vice-President.
FRANK HAWKINS, Chairman of the Board Citizens and [illegible]ern Bank, Atlanta, Ga.
WALTER W. HEAD, President The Omaha National Bank, Omaha, Neb.
JAMES D. HOGE, Vice-Chairman of Board The Dexter-Horton National Bank of Seattle, Wash.
W. GEORGE HYNSON, Vice-President and Treasurer.
JOHN KENT KANE, Manager, Philadelphia, Pa.
R. CROSBY KEMPER, President City Bank of Kansas City, Kansas City, Mo.
ARTHUR E. KIRKPATRICK, Manager, Toronto, Canada.
CHARLES H. KNAPP, Attorney-at-Law.
JOSEPH R. KRAUS, Vice-President and Executive Manager Union Trust Co., Cleveland, Ohio.
WILLIAM A. LANG, W. A. Lang, inc., St. Paul, Minn.
EDWIN W. LEVERING, JR., Vice-President.
WILLIAM H. MATTHAI, President Beaver Dam Marble Co.
S. McKENNAN, President Union Bank and Trust Co., Helena, Mont.
JAMES M. MOTLEY, President Levering Coffee Co.
RUSSELL T. MOUNT, Duncan & Mount, New York, N. Y.
H. A. MULLINS, Vice-President Royal Canadian Securit[illegible]o., Winnipeg, Canada.
GURNEY E. NEWLIN, Attorney-at-Law, Los Angeles, Cal.
ALONZO GOSE OAKLEY, Manager, New York, N. Y.
CHARLES H. PHILLIPS, Vice-President.
MORTON M. PRENTIS, President First National Bank.
ROBERT C. REAM, Ream, Wrightson & Co., Inc., New York, N. Y.
JESSE B. RIGGS, Riggs, Rossmann & Hunter, Inc.
PAUL A. SEEGER, Retired.
GEO. M. SHRIVER, Senior Vice-President Baltimore & Ohio R. R.
DONALD SYMINGTON, President Baltimore Trust Co.
W. W. SYMINGTON, Vice-President and Secretary.
CHAS. E. TAYLOR, President Wilmington Savings & Trust Co., Wilmington, N. C.
J. PEMBROKE THOM, Vice-President United Railways & Electric Co.
M. BARRATT WALKER, Vice-President.
MORRIS WHITRIDGE, Whitridge, White & Co.
HENRY B. WILCOX, Vice-President First National Bank.
FRANK W. WILLIAMS, State Agent, Meridian, Miss.

STANDARD PROVISIONS.

Change of Occupation. 1. **This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the Insured is injured after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.**

If the law of the State in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the State official having supervision of insurance in such State then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the Company's premium rates and classification of risks last made effective by it in such State prior to the occurrence of the loss for which the Company is liable.

Changes in Policy. 2. No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon.

Reinstatement of Policy. 3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Company or by any of its duly authorized agents shall reinstate the policy, but only to cover loss resulting from accidental injury thereafter sustained.

Time of Notice of Claim. 4. Written notice of injury on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury. In event of accidental death immediate notice thereof must be given to the Company.

Sufficiency of Notice. 5. Such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Company at Baltimore, Md., or to any authorized agent of the Company, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

Forms for Proof of Loss. 6. The Company upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

Time for Filing Proof of Loss. 7. Affirmative proof of loss must be furnished to the Company at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Company is liable, and in case of claim for any other loss, within ninety days after the date of such loss.

Medical Examination. 8. The Company shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

Immediate Payment of Indemnities. 9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid immediately after receipt of due proof.

Weekly Indemnity Payable in Installments. 10. Upon request of the Insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each four weeks during the continuance of the period for which the Company is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

To Whom Indemnities Payable. 11. Indemnity for loss of life of the Insured is payable to the beneficiary if surviving the Insured, and otherwise to the estate of the Insured. All other indemnities of this policy are payable to the Insured.

Cancellation by Insured. 12. If the Insured shall at any time change his occupation to one classified by the Company as less hazardous than that stated in the policy, the Company, upon written request of the Insured, and surrender of the policy, will cancel the same and will return to the Insured the unearned premium.

Rights of the Beneficiary. 13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

Limitations of Time for Bringing Suit. 14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

The Limitations Controlled by Statute. 15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the State in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

Cancellation By Company. 16. The Company may cancel this policy at any time by written notice delivered to the Insured or mailed to his last address as shown by the records of the Company, together with cash or the Company's Check for the unearned portion of the premiums

complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

Time for Filing Proof of Loss. 7. Affirmative proof of loss must be furnished to the Company at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Company is liable, and in case of claim for any other loss, within ninety days after the date of such loss.

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Cancellation by Insured. 12. If the Insured shall at any time change his occupation to one classified by the Company as less hazardous than that stated in the policy, the Company, upon written request of the Insured, and surrender of the policy, will cancel the same and will return to the Insured the unearned premium.

Rights of the Beneficiary. 13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

Limitations of Time for Bringing Suit. 14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

The Limitations Controlled by Statute. 15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the State in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

Cancellation By Company. 16. The Company may cancel this policy at any time by written notice delivered to the Insured or mailed to his last address as shown by the records of the Company, together with cash or the Company's Check for the unearned portion of the premiums actually paid by the Insured, and such cancellation shall be without prejudice to any claim originating prior thereto.

Age Limits of Policy. 20. The insurance under this policy shall not cover any person under the age of 18 years nor over the age of 70 years. Any premium paid to the Company for any period not covered by this policy will be returned upon request.

ADDITIONAL PROVISIONS.

INJURIES NOT COVERED. 21. This policy does not cover any accidental bodily injury caused or contributed to, directly or indirectly, by sickness or disease, ~~bacteremia~~, or by ptomaines, or by war or any act of war; nor disappearance; ~~nor loss resulting from any means or act which, if used, done or self-inflicted by the Insured while in possession of all mental faculties, would be deemed intentional~~; nor loss suffered while, or resulting from riding or being in or on any aerial device or conveyance, or in falling therewith or therefrom.

SPECIFIC AND PERMANENT LOSSES. 22. No payment shall be made for more than one loss under Schedule I. Any payment made under Schedule I shall terminate this policy, which must be surrendered.

Copy of Application Part of Contract. 23. The copy of the application endorsed hereon is hereby made a part of this contract. No provision of the charter, constitution or by-laws of the Company not included herein shall avoid the policy or be used in evidence in any legal proceedings hereunder.

Renewal of Policy. 24. This policy may be renewed, subject to all of its provisions, from term to term with the consent of the Company and by the payment of the premium in advance.

IN WITNESS WHEREOF, The said Company has caused this policy to be signed by its President, and its Secretary, but the same shall not be binding upon the Company unless countersigned by a duly authorized representative.

W. W. Symmes *Secretary.*

P. Howard Bland *President.*

Dated and Countersigned at San Francisco, California. the 1st day of September 19 28

By T. Ryan *Authorized Representative.*

AVIATION RIDER

(RENEWAL FORM)

Provided the policy to which this rider is attached is one of the forms listed below, and subject otherwise to its terms, provisions and agreements, the Company will pay indemnity, to the extent of the minimum amount provided in the policy, for any loss specified therein which shall result from accidental bodily injuries while the Insured is riding as a fare-paying passenger either in a licensed passenger airplane or a licensed passenger dirigible airship, owned and provided by an incorporated passenger carrier and while operated by a licensed passenger pilot over a definitely established regular passenger route of such carrier, and between definitely established airports.

This extension shall not cover loss sustained in any airplane or dirigible airship while it is being used for flights over water in excess of 100 miles, or more than 50 miles from land, sight-seeing or special or chartered flights, or in any military or naval airplane or dirigible, or in any form of aviation travel or hazard not hereinbefore specified, nor shall it cover injuries sustained by any person riding on a pass, or while acting as a pilot, mechanic or member of crew of an airplane or dirigible.

Nothing herein contained shall entitle the Insured for any such loss to the double, or other multiple indemnity, if any, specified in any such policy.

This rider is valid only when attached to and forming part of one of the following policy forms:

Cas.	1	Cas.	28	A&H.	43	A&H.	244
"	2	"	29	"	47	"	300
"	17	"	36	"	64	"	705
"	18	"	40	"	178	"	706
"	19	"	41	"	237	"	725
"	27	"	42	"	243	"	726

This rider takes effect upon the date of issuance on or after April 1st, 1929, and is substituted for Policyholder's letter, form A. & H.-319, which is hereby made null and void.

Attached to and forming part of Policy No. PA-47882 *Issued by the* UNITED STATES FIDELITY AND GUARANTY COMPANY, *of Baltimore, Maryland.*

To WALTER JOHN ASCHENBRENNER *of* OAKLAND, CALIF.

Dated at SAN FRANCISCO, CALIF. *this* 1st *day of* SEPTEMBER *19* 29

W W Symington
SECRETARY

P Norman Bland
PRESIDENT

Countersigned.....
Authorized Representative.

A. & H. 382 40M 4-8-29 ★

Made in U. S. A.

EARTHQUAKE INDEMNITY RIDER.

It is hereby understood and agreed taat Schedule V, captioned "Double Indemnities" in this policy, is extended by the addition of the following clause: —

"IN CONSEQUENCE OF EARTHQUAKE"

In other respects, the terms, limits. and conditions of this policy remain unchanged.

Attached to and forming part of Policy No. PA-47882 *Issued by the UNITED STATES FIDELITY AND GUARANTY COMPANY, of Baltimore, Maryland.*

To WALTER JOHN ASCHENBRENNER *of* OAKLAND, CALIF.

Dated at SAN FRANCISCO, CALIF. *this* 1st *day of* SEPTEMBER *19*28

W W Symington
SECRETARY

P Howard Bland
PRESIDENT

Countersigned V. Dixon

OPTIONAL GRADUATE NURSE RIDER

If "such injury" to, if the policy to which this rider be attached is an Accident policy, or if "such injury" to, or "such sickness" of the Insured, if the policy to which this rider be attached is a Disability Policy, shall necessitate the employment by the Insured of a registered graduate nurse, the Company will pay, in addition to any other indemnity to which the Insured may be entitled, excepting "SURGICAL OPERATIONS," Schedule VII, or "HOSPITAL EXPENSES," Schedule VIII, for the period not exceeding eight consecutive weeks, the amount per week actually expended by the Insured for graduate nurse expenses, but not exceeding the single weekly indemnity granted under this policy, nor exceeding $50.00 a week, if the single weekly indemnity under this policy is in excess of $50.00 a week, and proportionately for any period of employment for less than one week.

Attached to and forming part of Policy No. PA-47882 ***issued by the UNITED STATES FIDELITY AND GUARANTY COMPANY, of Baltimore, Maryland,***

To WALTER JOHN ASCHENBRENNER ***of*** OAKLAND, CALIF.

Dated at SAN FRANCISCO, CAL ***this*** 1st ***day of*** SEPTEMBER ***19*** 28

W W Symington
SECRETARY

P Howard Bland
PRESIDENT

A. & H. 20. 1-30-30 10M

Countersigned .....
Authorized Representative.

Made in U. S. A.

SUIC

It is Hereby Understood and Agreed th
act which, if used, done or self-inflicted by the I
deemed intentional" appearing in ADDITIO
COVERED, in this policy, is eliminated and the

NOR SUICIDE, SANE OR I

In other respects the terms, limits and condi

Attached to and forming part of Policy
FIDELITY AND GUARANTY COMPANY,

To WALTER JOHN ASCHENBRENNER

Dated at SAN FRANCISCO, CAL. *this*

W W Symington

SECRETARY

Countersigned

A. & H. 192 1-28-28 2M

UICIDE RIDER

) that the clause reading "Nor loss resulting from any means or e Insured while in possession of all mental faculties, would be TIONAL PROVISION 21, sub-captioned INJURIES NOT the following clause is substituted in lieu thereof:

R INSANE, OR ANY ATTEMPT THEREAT.

onditions of this policy remain unchanged.

icy No. P.A.-47882 *issued by the UNITED STATES Y, of Baltimore, Maryland,*

of OAKLAND, CALIF.

1st *day of* SEPTEMBER *19*28

P. Howard Bland
PRESIDENT

V. Owen
Authorized Representative.

Made in U. S. A.

Schedule IV. **OPTIONAL INDEMNITIES.**

Or, if "such injury" is one set forth in this schedule, and the Insured so elects in writing within twenty days from the date of the accident, he may take, in lieu of all other indemnity, except as provided under Schedule VII, the amount specified for "such injury" in this schedule, provided that not more than one such indemnity shall be payable as the result of any one accident; and provided always, that the amounts specified herein shall be payable only in case the Weekly Indemnity is $35.00; if such weekly indemnity is greater or less than $35.00, then the amount to be paid shall be increased or reduced proportionately.

For Loss—	
Of one or more Entire Fingers	$150
Of one or more Entire Toes	300
For Complete Dislocation—	
Of the Shoulder	100
Of the Elbow	100
Of the Wrist	125
Of the Hip	300
Of the Knee	150
Of two or more Bones of Foot (not toes)	150
Of the Ankle	150
Of two or more Toes	50
Of two or more Fingers	50
For Complete Fracture—	
Of the Skull, both Tables	325
Of the Lower Jaw	80

For Complete Fracture—	
Of the Collar Bone	$160
Of the Pelvis	250
Of the Thigh	300
Of the Leg (Tibia and Fibula)	200
Of the Leg (one bone)	100
Of the Knee Cap	200
Of the Arm, between Elbow and Shoulder	160
Of the Arm, between Wrist and Elbow (both bones)	160
Of the Arm, between Wrist and Elbow (one bone)	100
Of two or more Ribs	100
Of the Foot (two or more bones—not toes)	125
Of the Hand (two or more bones—not fingers)	125
Of two or more Toes	100
Of two or more Fingers	100
Of the Scapula (Shoulder Blade)	160

Schedule V. **DOUBLE INDEMNITIES.**

The amounts payable in all the foregoing Schedules shall be doubled if "such injury" is sustained by the Insured,

(1) While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service.

(2) While in a passenger elevator (excluding elevators in mines).

(3) In consequence of the destruction, by fire, of a building while the Insured is therein, (excluding firemen on duty).

(4) In consequence of being struck by lightning.

(5) In consequence of the collapse of the outer walls of a building while the Insured is therein.

(6) In consequence of the explosion of a steam boiler.

(7) In consequence of a cyclone or tornado.

Schedule VI. **NON-DISABLING INJURY INDEMNITY.**

Or, if "such injury" shall not disable the Insured or entitle him to any other indemnity under this policy, but shall require immediate medical or surgical attention, the Company will reimburse him for the cost of such treatment in an amount not to exceed the single Weekly Accident Indemnity for one week, provided that the attending physician's or surgeon's receipt is filed with the Company within ~~ninety~~ thirty days from date of accident.

Schedule VII. **SURGICAL OPERATIONS.**

If "such injury" to the Insured shall, within Ninety days from the date of the accident necessitate a surgical operation named in this schedule, the Company will pay, in addition to any other indemnity herein provided, the sum named for such operation in the Schedule of Surgical Operations; provided that not more than one such operation indemnity shall be payable as the result of any one cause of disability, and such operation indemnity may be subject to the election of the Insured; and provided always, that the amounts specified herein shall be payable only in case the Weekly Indemnity is $35.00; if such weekly indemnity is greater or less than $25.00 then the amounts to be paid shall be increased or reduced proportionately. Reimbursement will not be made for any operation which is necessitated by a disease or bodily condition contracted or existing prior to the issue of this policy.

AMPUTATION OF—	
Foot, Hand or Forearm	$ 25
Leg, at or above knee	50
Arm, above elbow	50
Thigh, involving hip joint	100
Fingers, one or more entire	10

REDUCTION OF FRACTURE OF—	
Wrist or Hand	$ 15
Fingers, one or more	10
Pelvis or Sacrum, any of the bones of	50
Coccyx	10
Thigh	75

(5) In consequence of the collapse of the outer walls of a building while the Insured is therein.

(6) In consequence of the explosion of a steam boiler.

(7) In consequence of a cyclone or tornado.

Schedule VI. **NON-DISABLING INJURY INDEMNITY.**

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Schedule VII. **SURGICAL OPERATIONS.**

If "such injury" to the Insured shall, within Ninety days from the date of the accident necessitate a surgical operation named in this schedule, the Company will pay, in addition to any other indemnity herein provided, the sum named for such operation in the Schedule of Surgical Operations; provided that not more than one such operation indemnity shall be payable as the result of any one cause of disability, and such operation indemnity may be subject to the election of the Insured; and provided always, that the amounts specified herein shall be payable only in case the Weekly Indemnity is $35.00; if such weekly indemnity is greater or less than $25.00 then the amounts to be paid shall be increased or reduced proportionately. Reimbursement will not be made for any operation which is necessitated by a disease or bodily condition contracted or existing prior to the issue of this policy.

AMPUTATION OF—	
Foot, Hand or Forearm	$ 25
Leg, at or above knee	50
Arm, above elbow	50
Thigh, involving hip joint	100
Fingers, one or more entire	10
Toes, one or more entire	10
REDUCTION OF DISLOCATION OF—	
Shoulder, Elbow, Hip, Knee or Ankle	25
Wrist or Lower Jaw	15
Fingers, one or more	10
EXCISION OF—	
Shoulder, Hip or Knee-Joint	100
Elbow, Wrist or Ankle-Joint	50
Eye	50
REDUCTION OF FRACTURE OF—	
Lower Jaw, Collar Bone, or Shoulder Blade	25
Breast Bone or Nose	10
Rib or Ribs	10
Rib or Ribs (resection)	50
Upper Arm	25
Forearm, one or both bones	25

REDUCTION OF FRACTURE OF—	
Wrist or Hand	$ 15
Fingers, one or more	10
Pelvis or Sacrum, any of the bones of	50
Coccyx	10
Thigh	75
Knee Cap (open operation)	50
Knee Cap (Fixation)	25
Leg Bone (one)	25
Leg Bones (both)	50
Foot, two or more bones, not toes	15
Toes, one or more	10
LAPAROTOMY (opening of the abdominal cavity for an operation on any organ contained therein)	100
INCISION FOR—	
Synovitis (inflamation of the lining membrane of a joint)	25
HYDROPHOBIA, Pasteur Treatment	50
GUNSHOT WOUNDS (not necessitating amputation or Laparotomy)	25
SKULL TREPHINING for fracture	100
SUTURING WOUNDS	5

Schedule VIII. **HOSPITAL EXPENSES.**

If "such injury" to the Insured shall, within ninety days from the date of commencement of disability therefrom necessitate his removal to a hospital, the Company, provided no claim is made under Schedule VII thereof, will pay, (in addition to the indemnity otherwise provided), for the period not exceeding Fifteen weeks during which the Insured shall be necessarily confined in the hospital, the amount expended by him weekly for hospital expenses, but not exceeding per week, the amount payable hereunder as single Weekly Indemntiy.

Schedule IX. **IDENTIFICATION INDEMNITY.**

If "such injury" shall render the Insured physically unable to communicate with friends, the Company will, upon receipt of a telegram or other message giving this policy number, immediately transmit to the relatives or friends of the Insured any information respecting him, and will defray all expenses, not exceeding One Hundred Dollars (in addition to any other indemnity herein provided), necessary to put the Insured in communication with and in care of friends.

TH. PILOT ACCIDENT OLICY.

This Policy Provides Indemnity for Loss of Life, Limbs, Sight, Speech, Hearing or Time Due to Accidental Bodily Injuries to the Extent Herein Provided.

UNITED STATES FIDELITY AND GUARANTY COMPANY

BALTIMORE, MD.

(HEREINAFTER CALLED THE COMPANY)

C 555-28

No. PA-47882

In Consideration of the premium of - - - - - $25.00 - - - - - Dollars, and of the statements in the application for this policy, copy of which is endorsed hereon and made a part hereof, and subject to all the provisions and limitations hereinafter contained and endorsed hereon,

Does Hereby Insure WALTER JOHN ASCHENBRENNER (Hereinafter called the Insured.)

by occupation MANAGER, PACIFIC RADIO TRADE ASSOCIATION. - OFFICE DUTIES. - - - - - Classed as SELECT

in the Principal Sum of SEVEN THOUSAND FIVE HUNDRED AND NO/100 ($7500.00) - - - - - - - - - - - - - - - - Dollars;

and for a Weekly Accident Indemnity of TWENTY FIVE AND NO/100 ($25.00) - Dollars,

for the term of TWELVE months, from the FIRST day of SEPTEMBER 1928, beginning and ending at 12 o'clock noon, Standard Time, at the place where the Insured resides,

(1) Against loss, as hereinafter defined, resulting directly, and independently of all other causes from accidental bodily injuries fatal or non-fatal, being hereinafter referred to as "such injury," as follows:

DEATH, DISMEMBERMENT, LOSS OF SIGHT, SPEECH OR HEARING.

Schedule I.

(a) If "such injury" shall continuously and wholly disable the Insured from date of accident from performing every kind of duty pertaining to his occupation, and during the period of such disability, shall result in one of the losses specified under **Specific Losses**, the Company will pay the sum set opposite such loss;

(b) Or, if within six months from the date of accident, irrespective of total disability, "such injury" shall directly result as aforesaid, in one of the losses specified under **Specific Losses**, the Company will pay the sum set opposite such loss, and

In Addition the Weekly Accident Indemnity as provided in Schedule II between the date of accident and date of such loss; provided further, that not more than one of the amounts (the greater) named under **Specific Losses** shall be payable for injuries resulting from one accident.

SPECIFIC LOSSES.

Loss of Life	The Principal Sum
Both Hands by actual separation at or above wrists	The Principal Sum
Both Feet by actual separation at or above ankles	The Principal Sum
One Hand and One Foot by actual separation at or above wrist and ankle	The Principal Sum
Entire Sight of Both Eyes if irrecoverably lost	The Principal Sum

DEATH, DISMEMBERMENT, LOSS OF SIGHT, SPEECH OR HEARING.

Schedule I.

(a) If "such injury" shall continuously and wholly disable the Insured from date of accident from performing every kind of duty pertaining to his occupation, and during the period of such disability, shall result in one of the losses specified under **Specific Losses**, the Company will pay the sum set opposite such loss;

(b) Or, if within six months from the date of accident, irrespective of total disability, "such injury' shall directly result as aforesaid, in one of the losses specified under **Specific Losses**, the Company will pay the sum set opposite such loss, and

In Addition the Weekly Accident Indemnity as provided in Schedule II between the date of accident and date of such loss; provided further, that not more than one of the amounts (the greater) named under **Specific Losses** shall be payable for injuries resulting from one accident.

SPECIFIC LOSSES.

Loss of Life		The Principal Sum
Both Hands by actual separation at or above wrists		The Principal Sum
Both Feet by actual separation at or above ankles		The Principal Sum
One Hand and One Foot by actual separation at or above wrist and ankle		The Principal Sum
Entire Sight of Both Eyes if irrecoverably lost		The Principal Sum
Entire Sight of One Eye, if irrecoverably lost, and One Hand at or above the wrist by severance		The Principal Sum
Entire Sight of One Eye, if irrecoverably lost, and One Foot at or above the ankle by severance		The Principal Sum
Speech and Hearing, if entire and irrecoverable		The Principal Sum
One Leg by actual separation at or above knee	Two-thirds	The Principal Sum
One Arm by actual separation at or above elbow	Two-thirds	The Principal Sum
One Hand by actual separation at or above wrist	One-half	The Principal Sum
One Foot by actual separation at or above ankle	One-half	The Principal Sum
Speech or Hearing if entire and irrecoverable	One-half	The Principal Sum
Entire Sight of One Eye if irrecoverably lost	One-third	The Principal Sum
Permanent Stiff or Rigid Elbow and Knee Joints	One-sixth	The Principal Sum
Thumb and Index Finger of Either Hand by actual separation at or above metacarpo-phalangeal joints	One-sixth	The Principal Sum
Permanent Stiff or Rigid Elbow or Knee Joint	One-twelfth	The Principal Sum

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Schedule II. INDEMNITY FOR TOTAL OR PARTIAL DISABILITY

TOTAL LOSS OF TIME. Of, if "such injury" shall not result in any of the losses mentioned in Schedule I, but shall cause continuous total disability, and prevent the Insured from date of accident, from performing any and every duty pertaining to his occupation, the Company will pay him the weekly Accident indemnity above specified, for the period of such disability.

PARTIAL LOSS OF TIME. Or, if "such injury" shall from the date of accident or immediately following total disability, prevent the Insured from performing one or more material duties pertaining to his occupation, the Company will pay one-half of the above specified weekly Accident indemnity for the period of such continuous partial disability, but not to exceed a period of fifty-two consecutive weeks. Weekly indemnity will not be payable under the provisions of Schedule I except as therein stated.

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original on file in my office, and that I have carefully compared the same with the original.

Witness my hand and seal of said Superior Court this 9th day of March, 1932.

[Seal] E. B. HINMAN,
County Clerk and Ex-Officio Clerk,
Superior Court
By F. M. RYAN,
Deputy Clerk. [3]

Photostats of pages [4-7] inserted opposite.

State of California,
County of San Mateo.—ss.

I hereby certify that Summons were issued on January 23, 1932, by Laura F. Collins, Deputy Clerk, in the action entitled "Alice A. Aschenbrenner v. United States Fidelity and Guaranty Company, a corporation, No. 20,073.

Dated, March 3rd, 1932.

[Seal] F. M. RYAN,
Deputy County Clerk and ex-officio Deputy Clerk of the Superior Court of the State of California, in and for the County of San Mateo.

[Endorsed]: Filed Mar. 16, 1932. [8]

[Title of Court and Cause.]

ANSWER.

Comes now defendant, and in answer to the complaint admits, denies, and alleges, as follows:

I.

Answering paragraph IV of the complaint, defendant denies, both generally and specifically, conjunctively and disjunctively, each, all and every allegation in said paragraph of said complaint contained.

WHEREFORE, defendant prays that the complaint herein be dismissed, with costs.

HORACE W. B. SMITH,
GEO. A. WORK,
Attorneys for Defendant. [9]

State of California,
City and County of San Francisco.—ss.

Edwin C. Porter, being first duly sworn, deposes and says: That he is an officer, to-wit, Resident Vice-President, of the United States Fidelity and Guaranty Company, the defendant above named, and as such officer is authorized to verify pleadings on behalf of said corporation; that he has read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated upon information or belief, and as to those matters, he believes it to be true.

EDWIN C. PORTER.

Subscribed and sworn to before me this 15th day of April, 1932.

[Seal] MARIE FORMAN,
Notary Public in and for the City and County of San Francisco, State of California.

and receipt of a copy of the within Answer is hereby admitted this 15th day of April, 1932.

WRIGHT & WRIGHT & LARSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 15, 1932. [10]

[Title of Court and Cause.]

VERDICT.

We, the Jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of fifteen thousand dollars and interest at 7% from and after Nov. 9, 1931.

($)

Dollars. 15,000.00

FRANK A. BOGART,
Foreman.

[Endorsed]: Filed Nov. 23, 1932. [11]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19,198-S

ALICE A. ASCHENBRENNER,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Defendant.

JUDGMENT ON VERDICT.

This cause having come on regularly for trial on the 22nd day of November, 1932, being a day in the November 1932 term of said Court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; Randall Larson and John Ralph Wilson, Esquires, appearing as attorneys for plaintiff, and George A. Work and Horace W. B. Smith, Esquires, appearing as attorneys for defendant, and the trial having been proceeded with on the 23rd day of November, in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and

assess the damages against the defendant in the sum of fifteen thousand dollars and interest at 7% from and after Nov. 9, 1931, dollars 15,000.00. Frank A. Bogart Foreman.", and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Alice A. Aschenbrenner, plaintiff, do have and recover of and from United States Fidelity and Guaranty Company, a corporation, the sum of sixteen thousand ninety and 83/100 dollars ($16,090.83), together with her costs herein expended taxed at $

Judgment entered this 23rd day of November, 1932.

WALTER B. MALING,
Clerk. [12]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 22nd day of November, 1932, at the November term of the District Court of the United States for the Northern District of California, Southern Division, the above entitled cause came on for trial before a jury, and thereafter a jury was impanelled and sworn to try said cause, and the trial commenced on the 22nd day of November, 1932, Wright,

Wright & Larson and John Ralph Wilson, Esqs., appearing for the plaintiff, and Horace W. B. Smith and George A. Work by George A. Work, appearing for the defendant.

ALICE ATWOOD ASCHENBRENNER,

called as a witness, in her own behalf, was duly sworn and testified as follows: I am the plaintiff in this case and the widow of Walter John Aschenbrenner.

Mr. WILSON.—Q. What was Mr. Aschenbrenner's age at the time of his death?

A. He was 41.

Q. What was his height, Mrs. Aschenbrenner.

A. Five feet nine and a half, I should judge, about my height.

Q. What was his weight?

A. 145 or 48.

Q. What was his condition of health for a year or two prior to the accident?

A. It had always been perfect.

Q. Was he an active man?

A. Very active.

Q. Physically, of course?

A. Yes. [13]

Whereupon, counsel for the plaintiff offered in evidence the policy of insurance which is the subject matter of this action, called The Pilot Accident Policy, issued by the United States Fidelity &

Guaranty Company. The due execution of the policy as set forth in the complaint, and that it was binding upon the defendant, United States Fidelity & Guaranty Company, according to its terms, was admitted by the attorneys for the defendant.

The attorneys for the defendant further admitted that the single indemnity amount provided for in the policy, to-wit, $7,500.00, was due to the plaintiff and had been due to her since the date of the death of the assured therein, Walter John Aschenbrenner, on the 29th day of October, 1931, but denied that the plaintiff was entitled to the payment of the so-called double indemnity of the policy, to-wit, the sum of $7,500.00 additional, and the testimony at the trial was addressed to the issue concerning the double indemnity amount solely.

That the material provisions of the insurance policy are as follows: The defendant, United States Fidelity & Guaranty Company, does insure Walter John Aschenbrenner (the deceased) in the principal sum of $7,500.00 (1) against loss, as in said policy defined, resulting directly, and independently of all other causes from accidental bodily injuries, fatal or non-fatal, being hereinafter referred to as "such injury," as follows: Loss of life, the principal sum. The policy further provides:

"Schedule V. Double Indemnities.

The amounts payable in all the foregoing schedules shall be doubled if 'such injury' is sustained by the insured,

(1) While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service." [14]

It is admitted that the train, in connection with his efforts to board which the assured met his death, was at the time a public conveyance provided by a common carrier for passenger service, the sole question being whether at the time the assured sustained the accidental injuries resulting in his death he was a passenger in or on the train involved. The plaintiff to sustain the issue on her part called as a witness in her behalf,

CHARLES A. BAKER,

a bank teller in the employ of the Wells Fargo Bank & Union Trust Company in San Francisco. He testified in substance as follows:

He resided in October, 1931, on Balboa Avenue in Burlingame; he saw an accident on the morning of October 29, 1931, at the Broadway Station in Burlingame. He did not know Mr. Aschenbrenner. He was about a block away from the station at the time on Broadway and Chula Vista. That he saw the platform of the Southern Pacific Station from where he was standing and saw a taxicab pull up near the train and two gentlemen get out of the

(Testimony of Charles A. Baker.)

taxicab and run for the train. They were quite close together all the way to the train. That the train had just started when they alighted from the taxicab. Seeing them run to the train attracted his attention to them. He could not drop his eyes when he saw the two men running for the train; he was afraid something might happen. The men were close together and by the time they got to the train it was going at a pretty good clip. That Mr. Aschenbrenner, the man who got on the train, was to the right of the other man, and that it was the witness' impression that he, Aschenbrenner, boarded the train and swung on the steps. That he saw the man get on the train and that the other gentleman was quite close to him when he, Aschenbrenner, was on the steps of the train. That as he reached the other gentleman standing they ran together. Mr. [15] Aschenbrenner lost his control and had hold with his right hand on the train, and it knocked him back against the train with his back against it; he lost his hold completely and fell under the train.

Cross-examination.

Mr. WORK.—The train was going west at the time, towards San Francisco.

A. Yes sir.

Q. You say that you were a block away from it at the time this took place, is that right?

(Testimony of Charles A. Baker.)

A. Yes, sir; I imagine that it would be 300 or 400 feet that he was away from the train.

Q. Now, you saw Mr. Aschenbrenner grab ahold with his right hand, did you?

A. Yes, sir.

Q. Did you see him get ahold with his left hand.

A. No, sir.

Q. He didn't get ahold with his left hand, is that right?

A. No.

Q. Did he get both feet on the lower step?

A. From where I was it looked like he had both feet on the step.

Q. It looked to you that he had both feet on the lower step?

A. Yes, sir.

The COURT.—Could you see the lower step?

A. Yes, sir.

The COURT.—Tell the jury exactly what you saw.

A. From where I was he was on the lower step.

Q. Would you say that you saw him on the lower step?

A. Yes, sir.

Mr. WORK.—Did he have both feet on the lower step?

A. Yes.

Q. How far did the train move after he had both feet on the lower step, would you say, before he fell off?

(Testimony of Charles A. Baker.)

A. Well, it was about a quarter of the length of the car. [16]

Q. Just about a quarter length of the car?

A. Yes, sir.

Q. I understood you to say that the train was going at the time at a pretty good clip.

A. Yes, sir.

Q. Would you say ten miles an hour, or could you make any estimate?

A. It is hard to judge, but it's too fast for a man to attempt to get on.

Q. That impressed you at the time?

A. Yes, sir, that was why I was watching so intently.

Q. After he had gone about this quarter length of the car on the steps there, he swung back against the side of the coach, did he?

A. It brought him up to where the other gentleman was; they were in close contact there and he swung around with his back toward the coach.

Q. Then he fell instantly after touching the other man?

A. The man lost control of himself and could not swing around again and then fell down."

That it was a dry, clear morning, about 7:35 A. M.

MALCOLM P. BUTTON

was then called as a witness for the plaintiff and testified that he resided in Burlingame in October, 1931, and still resides there. That he operated a service station on the corner of California Drive and Broadway in Burlingame. That California Drive runs paralled to the Southern Pacific Railroad at that point, and that it was about 120 or 130 feet from the easterly curbstone of California Drive to the westerly track of the Southern Pacific Railroad. That the station platform extended on both sides of Broadway. That there were no obstructions on the platform north of Broadway at the time of the accident. That the railroad roadbed was some six inches or eight inches higher than California Drive. That the platform at the railroad station consisted of a short strip [17] of concrete, but chiefly of crushed rock and gravel. That the lowest step on the train was above the level of the platform. That on the 29th of October, 1931, he saw Mr. Aschenbrenner atttempting to board a train. That he saw the taxi arrive at the station; that the witness was standing just outside his service station. That he saw Mr. Aschenbrenner running to board the train on the north side of Broadway.

Q. Where was it that Mr. Aschenbrenner was running to board the train, on the north side or the south side of Broadway?

A. On the north side of Broadway.

Q. Where did the taxicab stop?

(Testimony of Malcolm P. Button.)

A. The taxicab stopped on the left hand side of Broadway; it turned into the left hand side of Broadway and stopped.

Q. At the time the taxicab stopped was there a train standing in the station?

A. Yes, it just started to move at that time.

Q. Just started to move at that time? When?

A. When the cab stopped.

Q. How far did the cab stop in back of the train, away from the train?

A. The side of the train? I imagine it was ten or fifteen feet. No, it would be further than that, because there is another track in there: twenty or twenty-feet possibly.

Q. This train was on the most westerly track, the train nearest to you?

A. No, sir.

Q. The easterly track?

A. The right hand track.

Q. How many people got out of the taxicab?

A. Two gentlemen.

Q. Did you know either one at that time?

A. No, sir.

Q. Did you know afterwards that one was Mr. Aschenbrenner? [18]

A. I heard after the accident that was his name.

Q. Just state what the two men did?

A. Well, the cab stopped and they both got out of the left hand side of the taxicab and they hesi-

(Testimony of Malcolm P. Button.)

tated just a moment; then started toward the train which was in motion at that time, and I would say they ran about half of the car length. Ar. Aschenbrenner was on the right hand side and the gentleman with him was on his left, this way, running side by side toward the front end of this coach. The gentleman on the left apparently was going to catch the rear end, about the third to the last car on the train, and Mr. Aschenbrenner had a brief case in his right hand and an overcoat over his left arm and he boarded the front end of the second to the last coach on the train, and he grabbed the rail with his right hand and after he was on he stopped and apparently started to change hands with his overcoat or brief case, and there was some confusion between the brief case and his overcoat, and this gentleman that started to jump on the other platform, he had stopped; they apparently were right together then when Mr. Aschenbrenner fell.

Q. You say Mr. Aschenbrenner attempted to board the front platform and the other man the rear platform, was that of the car ahead?

A. Yes.

Q. How many feet did Mr. Aschenbrenner have on the train?

A. He had both feet on the train.

Q. Both feet?

A. Yes, sir.

(Testimony of Malcolm P. Button.)

Cross-examination.

Mr. WORK.—How far had the train gone before Mr. Aschenbrenner fell off?

A. Possibly half a car length.

Q. Approximately how long are those cars?

A. I think they're around sixty feet. [19].

Q. Did Mr. Aschenbrenner take hold of the left hand hold with his left hand?

A. No, sir.

Q. He did not?

A. No, sir.

Q. He took ahold of only the right hand hold with his right hand?

A. Yes, sir.

Q. Are your sure that he had both feet on the lower step?

A. Yes, sir.

Q. What specially called your attention to that fact, if anything?

A. Well, he was, was standing there.

Q. You say he was trying to change his overcoat from one hand to the other?

A. That was my impression.

Q. Did you see him do anything with his arm?

A. I saw a motion there with that arm that the overcoat was on. That was my idea at the time that he was possibly trying——

Q. If that is only your conclusion about it you didn't see him actually put the overcoat from one arm to the other?

(Testimony of Malcolm P. Button.)

A. Didn't change arms.

Q. This thing happened very quickly, didn't it?

A. Yes, sir.

Q. Were you looking right at Mr. Aschenbrenner and this platform while all this was taking place?

A. Yes, sir.

Q. How many feet would you say you were away from the platform when Mr. Aschenbrenner jumped on?

A. It would be around a hundred and twenty or thirty feet.

Q. How fast would you say the train was going at the time?

A. That is pretty hard to tell; I would say eight or ten miles an hour.

Q. As I understand you to say, the man with Mr. Aschenbrenner was to his left, was to Mr. Aschenbrenner's left?

A. Yes, sir. [20].

Q. That is looking at them from behind, is that right?

A. Yes, sir.

Q. Obviously, therefore, Mr. Aschenbrenner was to this man's right?

A. Yes, sir.

Q. How far apart would you say they were.

A. Possibly a foot, maybe two feet apart.

Q. Did the other man make any contact with the train at all?

(Testimony of Malcolm P. Button.)

A. No, sir.

Q. How far was the other man from Mr. Aschenbrenner when Mr. Aschenbrenner fell off?

A. He seemed right— by that time he stopped and seemed to be right at the spot where Mr. Aschenbrenner fell.

Q. Did the other man run along the train as the train proceeded or did he stop before he got to the train?

A. I don't quite understand.

Q. I will ask you this: Did they run at right angles to the train, then run along beside it or go diagonally toward the train?

A. Sort of diagonally at first, then parallel with the train.

Q. How far along and parallel to the train did Mr. Aschenbrenner run before he got to take ahold of it?

A. It was just a few feet; I imagine ten feet or less.

Q. How far along did the other man run with him?

A. The other man was slightly in advance of him by the time he was up to the rear door of the other coach.

Q. How far?

A. Three feet.

Q. Did the other man keep ahead of Mr. Aschenbrenner as they ran up beside the train?

A. No, sir, they were side by side.

(Testimony of Malcolm P. Button.)

Q. About side by side then, paralleling the train, is that [21] right?

A. Yes, sir.

Q. Did the other man brush Mr. Aschenbrenner or did Mr. Aschenbrenner brush him as Mr. Aschenbrenner got on the train?

A. Not as he got on the train I don't believe; because he was ahead of him when Mr. Aschenbrenner got on the train.

Q. Mr. Aschenbrenner was ahead of the other man?

A. No, sir, the other man was ahead of him.

Q. What I am asking you is, did they come in contact at or about the time that Mr. Aschenbrenner got on the step?

A. I didn't say that they came in contact.

Q. You didn't say they came together at all?

A. No, I didn't see them.

Q. Did you see Mr. Aschenbrenner swing back against the side of the coach holding on with his right hand to the right hand hold?

A. Yes, and swing slightly back, then drop.

Q. And that took place while the car was going probably a half a car length, that is your judgment of the distance at any rate, is that right?

A. Yes, sir.

WILLIAM J. McCAULEY

was then called as a witness for the plaintiff. He testified that he lived at 511 California Drive, Burlingame, in October, 1931; that he was a taxicab driver at that time. That he called at the house of Mr. Aschenbrenner on the morning of October 29, 1931, and picked up Mr. Aschenbrenner and his friend and took them down to the train, arriving at about 7:35 A. M. A train had just pulled in when he arrived. He stopped his cab on Broadway about twenty feet from the westerly tracks and he was facing the train. When he stopped his car the train was just beginning to pull out of the station. The passengers got out and Mr. Aschenbrenner started to reach for the money to pay him and he told Aschenbrenner he could pay later, and both men ran for the train, running north parallel with the tracks. They went on somewhat of an angle. That he [22] saw Aschenbrenner board the train; that he was about forty feet away at the time. That the train was moving between seven and eight miles per hour at the time. That Mr. Aschenbrenner made an attempt to get on to the train; he jumped on the lower step and was hanging with one hand. That he, the witness, did not see Mr. Aschenbrenner's left hand and could not see whether he held with that hand, but it was his impression that he did not because he had an overcoat on that arm. That he rode on the train for a distance of about twenty feet with his feet on the lower step. That Mr. Aschenbrenner's friend was about two feet

(Testimony of William J. McCauley.)

ahead of him and was running along with the side of the train, but he did not notice what the man was doing at the time. That the vestibule door of the train was open at the time that Aschenbrenner took hold of the train. That Mr. Aschenbrenner had both feet on the train.

Cross-examination
by Mr. Work.

Q. There is no other reason than that you watch people run for trains ordinarily, is that right?

A. Yes, sir.

Q. I will ask you this: Did you watch Mr. Aschenbrenner run for the train because at that time you thought the train was going too fast for him to board it?

A. No, sir. It was not moving. I think he could have made it; he should have made it. I don't know—in fact he did get on; I don't know why he didn't stay on.

Q. Did you see anybody push him off?

A. No, sir.

Q. Did he stumble?

A. No.

Q. What was it that made him fall off? As far as you saw?

A. His coat, I would say.

Q. All right. What did his coat do to him that made him [23] fall off?

(Testimony of William J. McCauley.)

A. Why, I think the wind probably caught his coat.

Q. Well, now, Mr. McCauley, I am not asking for your conclusions, I am asking for what you saw. You said his coat made him fall off?

A. Yes.

Q. What was it about his coat that you saw, not what you think or conclude from what you saw?

A. I don't know. I didn't see any reason why he did fall off.

Q. You saw no reason at all why he did fall off?

A. No.

Q. He just grabbed for the train with his right hand, right?

A. He hung with one hand while he was on.

Q. That was his right hand?

A. Yes, sir.

Q. Which foot did he put on first?

A. Left one.

Q. He put the left one on first?

A. Yes, sir.

Q. You saw him put the left one on, then how far had the train gone before he put on his right foot?

A. Probably a quarter of a foot.

Q. Probably a quarter of a foot?

A. A half a foot.

Q. You saw him put the left foot on, then the train went a half a foot and up came the right foot, is that right?

(Testimony of William J. McCauley.)

A. Yes, sir.

Q. Then the train went about twenty feet you said and he fell off?

A. Yes, sir.

Q. Did you see him swing out?

A. Yes, sir.

Q. Before he actually fell?

A. Yes, sir.

Q. Did you see him swing with his body around against the side of the coach?

A. Yes, sir.

Q. You saw that?

A. Yes.

Q. How far had the train gone when you saw him swing out with his body against the side of the coach? [24]

A. Since he got on, about twenty feet.

Q. I understand you to say that it had gone about twenty feet when he fell off?

A. Yes.

Q. How far had it gone when you saw his body swing out against the coach and before he fell off? Would you say about half that distance?

A. No.

The COURT.—Did his body start to swing as soon as his feet hit the step?

A. No, sir.

Mr. WORK.—How far had the train gone before his body started to swing out?

A. Eighteen feet, I would say.

(Testimony of William J. McCauley.)

Q. About eighteen feet?

A. Yes, sir.

Q. He just swung out and down he went, is that right?

A. Yes.

Q. That about describes it?

A. Yes.

Q. Mr. McCauley, would you say that before he fell he turned and faced in your direction?

A. Not in my direction, no, sir.

Q. Not in your direction?

A. He faced in a westerly direction.

Mr. WORK.—Would you say that while his feet were on the steps before he fell off his shoulders swung around until he lost his hold and his feet slipped off and he went under the train; that about it?

A. Yes, sir.

Q. How far had the train gone after he got on it before his shoulders started to swing at all, to the best of your recollection?

A. Approximately eighteen feet.

The next witness called for the plaintiff was

RICHARD H. SANDERSON,

who testified that he lived in Redwood City in October, 1931, and had his place of business at 1355 Broadway, Burlingame. That he went from his residence to his business on the Southern Pacific to the Broadway Station, arriving there at 7:32

(Testimony of Richard H. Sanderson.)

A. M. That he saw an accident on October 29, 1931, at that place. That he was standing on a strip of cement between [25] the Market Street Railway and California Drive; that the strip forms a platform for the Market Street Railway and also the easterly sidewalk of California Drive. That he saw a taxicab stop on Broadway and that the cab was about twenty feet from the Southern Pacific tracks.

Q. Did you observe whether that train was standing or whether it was moving?

A. It was standing. Just started to move as the taxicab stopped.

Q. Tell what you saw the men who alighted from the taxicab do.

A. I saw two men start running for the train and they ran in parallel toward the train, at an angle towards it, and one was slightly ahead of the other and the one behind caught the train, the front end of the coach; the other kept running for a little while, then he stopped.

Q. And the man that was behind—state what he did with relation to getting on the train, if anything?

A. When he got close enough to the train he turned slightly to the right and grabbed the right hand hold, the hand rail they call it, on the front end of the coach and alighted.

Q. Alighted where?

A. On the steps of the train.

(Testimony of Richard H. Sanderson.)

Q. Did you observe his feet?

A. Yes, sir.

Q. Did he have his feet on the train?

A. Yes, sir.

Q. How many of them?

A. Two.

Q. After this man had jumped on the train with both feet and a hand, what did the other man do?

A. The other man ran for a little ways and stopped, apparently was endeavoring to get the rear end of the coach ahead. He stopped and this man that was on the steps of the coach back of it came up where he was and bumped into him. [26]

Q. About how far did the man who put his feet on the train, how far did he ride?

A. I didn't take any measurements—say, probably, probably twenty feet.

Q. Anything happened to the man who jumped on the train?

A. Yes, he stood there for some little time.

Q. Anything happen to him after that?

A. The man who was on the platform—I think it's a part of the platform—that line between the two tracks—bumped into the man that was on the steps and overbalanced him and he swung around to the left and fell down under the train.

Q. Did you know Mr. Aschenbrenner?

A. No, sir.

Q. The man that was on the steps, did you afterwards find out he was injured?

(Testimony of Richard H. Sanderson.)

A. Yes, sir.

Q. The other man was not injured in this accident?

A. No, sir.

Upon cross-examination the witness testified that he was probably 110 or 115 away; that the decedent had run probably forty feet.

Q. Would you say he didn't take ahold of the left hand hold, is that right?

A. No, sir, he took hold of the right.

Q. Took ahold of the right. Would you say that the train went about twenty feet before he fell off, is that right?

A. I should judge that.

Q. Was there a collision between the man who was with him and Mr. Aschenbrenner just at the time he fell off.

A. Yes.

Q. Did Mr. Aschenbrenner's coat brush the man?

A. It was his coat or his body, one of the two.

Q. His coat or his body. Was his body outside the line of the car at the time?

A. Part of it. [27]

Q. Part of his body was outside. When I say "line of the car" I mean the line running from front to rear on the side of the coach?

A. Yes.

Q. How far out of the line of the coach would you say his body was at the time of the collision?

(Testimony of Richard H. Sanderson.)

A. Few inches.

Q. Pardon me.

A. A few inches.

Q. Did he fall immediately?

A. Not immediately, within a few seconds.

Q. What I mean is, when the impact took place between the two men did he fall off immediately?

A. He started to rock and swung around and fell.

The COURT.—This all happened very quickly?

A. Yes, sir.

DAVID McGOWAN

was the next witness called for the plaintiff. He testified that he resided on Balboa Avenue in Burlingame and that he was engaged in business in Burlingame, running a service station on the northwest corner of Broadway and California Drive, and his service station faced the Southern Pacific station. That on the morning of October 29, 1931, he was at his service station and witnessed an accident. That he was standing in the driveway and heard the taxicab toot its horn, and saw the cab turn the corner just as the train was pulling out. The cab was travelling south and he turned east off Broadway from California Drive, making a left hand turn, and stopped. That it stopped fifteen or twenty feet from the Southern Pacific tracks. That there was a train in the station at the time and two

(Testimony of David McGowan.)

gentlemen go out of the cab. When they got out of the cab, one of the men, whom he afterward learned was Aschenbrenner, hesitated as though he was going to pay the driver and then started to run. The other man was ahead of him running. He saw Aschenbrenner jump on the train, grab the bar with his right hand and get on the train. The other man was a short distance ahead of him but he stopped and did not try to [28] board the train. Mr. Aschenbrenner had a coat on his left arm and when he went to go in the car the other man brushed past him. He saw Aschenbrenner's feet slip off the steps and saw him go down under the car. That the train was going ten or twelve miles an hour when Aschenbrenner grabbed it. That there was no obstruction between him and the train to interfere with his vision and he was about 110 feet away. That Mr. Aschenbrenner had hold with his right hand, both feet were on the lower step, and that his overcoat and his left arm were about the only part of his body really on the outside of the vestibule when the other man brushed up against him. That Mr. Aschenbrenner continued on the train ten or twelve feet before he fell off.

On

Cross-examination.

the witness testified that Mr. Aschenbrenner did not fall instantly as the two came together; he swung around first and faced toward the witness with his body swing against the side of the coach.

(Testimony of David McGowan.)

That he never got back to the point from which he started to swing before he fell, but fell almost at once after swinging out. That Mr. Aschenbrenner's companion did not fall but that the impact brushed him away from the train. That the impact was not violent. That the overcoat and the left part of his body were outside the train. That the vestibule door was not closed and that they never close them.

CHARLES BEHR,

the brakeman on the train at the time of the accident, was next called as a witness for the plaintiff. He testified that he was the brakeman on the train involved here, a train running between San Francisco and San Jose. That the train arrived at the Broadway station at 7:32 A. M. That he was on the last car on the right hand steps. That there were two brakeman on the train, the other brakeman up probably six cars ahead of him; the train carrying eight coaches. That he saw [29] the accident occur. That after all the commuters got on he saw a taxicab drive up just as the train was starting up and he saw two men get out of it. They hesitated as though they were paying the driver and then ran at a kind of angle toward the train. One of the gentlemen got on the train while the train was going approximately ten miles an hour and the other man stopped and hesitated like he

(Testimony of Charles Behr.)

was going to get on but changed his mind and didn't get on. That he, the witness, was on the last car looking forward along the coaches. That it would take thirty or forty feet for the train to pick up a speed of five miles an hour. That the vestibule was open; that they had not been closed because the train was not out of the station.

Upon

Cross-examination

he testified that Mr. Aschenbrenner put two feet on the lower step and the train was going between seven and ten miles an hour at the time.

It was stipulated by counsel that Mr. Ishem, the man who was with Mr. Aschenbrenner at the time of the accident, was dead.

The plaintiff rested and thereupon the defendant moved the Court to direct the jury to bring in a verdict in favor of the plaintiff for the single indemnity amount of the policy. The motion was denied and the defendant excepted, and thereupon the defendant called Doris M. O'Keefe as its first witness. She testified that she was at the Burlingame station on the morning of October 29, 1931 and that she saw an accident there where a man made an attempt to board a train. That she was standing on the left side of Broadway, just by the tracks, about ten or fifteen feet away from the

tracks. That she was waiting for the 7:36 A. M. train, a train following the one that Mr. Aschenbrenner tried to board. She saw a taxicab draw up and two gentlemen get out and run for the train. They ran across in front of her, running parallel, the other man being ahead of Mr. [30] Aschenbrenner. She saw the other man stop. Mr. Aschenbrenner jumped and grabbed the rod with his right hand and had an overcoat in his left hand and a bag in his right hand. That he got one foot on the step but she was not positive about the other foot. The train went about half a car length before he fell. That he seemed to swing to the left and slid down and fell underneath.

That the foregoing evidence constitutes all the evidence material to the issues in the case or affecting the matters to which the exceptions relate.

The defendant rested and thereupon moved the court to direct the jury to bring in a verdict for the plaintiff for the sum of $7500.00 and legal interest from the date of the accident to the date of the trial, and that as to the element of double indemnity, that is, the second $7500.00 in issue in the case, that the court direct the jury to find in favor of the defendant upon the ground that the decedent had not become a passenger upon the train at the time that he fell off.

Thereupon the plaintiff moved the court to direct a verdict in its favor upon the ground that the evidence showed that the deceased at the time of his injury was riding as a passenger upon the train.

The court denied the motion of the defendant for a directed verdict and the defendant then and there excepted; and the court denied the motion of the plaintiff for a directed verdict and the plaintiff then and there excepted. The court thereupon instructed the jury in precise words as follows:

"Gentlemen of the Jury: In this action the plaintiff has brought suit to recover from the defendant the sum of fifteen thousand dollars alleged by plaintiff to have become due to her as the widow of one Walter John Aschenbrenner, pursuant to the terms of a certain policy of insurance executed and delivered [31] for good consideration to said Walter John Aschenbrenner by said defendant, United States Fidelity & Guaranty Company.

"In civil cases such as this the affirmative of the issue must be proved and the affirmative here is upon the plaintiff. Upon the plaintiff, therefore, rests the burden of proof. Therefore, before any juror is warranted on his oath to assent to a verdict in favor of the plaintiff he must feel satisfied that the plaintiff's case has been established by a preponderance of evidence. Preponderance of evidence means not the greater number of witnesses, but the greater weight or the more convincing force of the evidence offered by the party having the

affirmative when compared to that opposed to it. If the evidence is so equally balanced in weight and quality that the scales of proof hang even, your verdict should be in favor of the defendant.

"The term 'preponderance of evidence' is not a mere figure of speech. It is a substantial right given by law, that you cannot render a verdict against a defendant unless the plaintiff has established his case by a preponderance of evidence.

"I further instruct you that you are the sole judges of the effect or value of the evidence which has been addressed to you. This power of judging the effect of the evidence, however, is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to decide in conformity with the declaration of any number of witnesses who do not produce conviction in your mind against a less number or against evidence which satisfies your mind. The mere number of witnesses produced on either side is itself of no importance. You should decide entirely in accordance with the conviction produced in your mind after hearing all the evidence in the case.

"You are likewise the exclusive judges of the credibility [32] of the witnesses. Witnesses are presumed to speak the truth. This presumption, however, may be repelled by the manner in which the witness testifies, by the character of his or her testimony, his or her motives, or by contradictory evidence.

"You are instructed in this case that the defendant, United States Fidelity & Guaranty Company, admits that it executed the Pilot Accident Policy upon which this action is founded, and that there is due and ever since the death of Walter John Aschenbrenner there has been due from it to the plaintiff in this action the sum of $7500.00, the so-called single indemnity amount provided in the policy. The difference between the parties has arisen out of the provisions therein under the heading 'Double Indemnities', and the pertinent provision here with respect to such double indemnity is as follows:

> 'The amounts payable in all the foregoing schedules shall be doubled if such injury is sustained by the insured:
>
> 1. While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service.'

"It is the position of the plaintiff that the injury sustained by the decedent, Walter John Aschenbrenner, was sustained by him under such circumstances as to bring the facts within this provision; in other words, that at the time of his injury the decedent was a passenger, thus entitling the plaintiff to receive the $15,000 instead of the $7,500 which the defendant concedes. It is the position of the defendant, on the other hand, that the facts here do not bring the injury within the provision of the policy just quoted providing for

double indemnity, and that at the time of his injury the decedent was not a passenger, and this is the only issue in the case. [33]

"The defendant admits the due execution and delivery of the policy of insurance to said Walter John Aschenbrenner, and that the plaintiff, Alice A. Aschenbrenner, is the beneficiary named in said policy to recover thereon in the event of the death of said Walter John Aschenbrenner if caused by and arising under a certain specified condition stated in the policy.

"No dispute arises in this case as to the right of the beneficiary to recover against the defendant pursuant to the terms of the policy, and no question arises as to the validity of the policy as it stands according to its terms.

"It is without dispute that the Southern Pacific Company at the time of the accident was a common carrier and was operating a train which the decedent tried to board, as a passenger train for regular passenger service.

"I further instruct you that the fact that the decedent was attempting to board a moving train did not prevent him from becoming a passenger under the terms of the insurance policy. Whether or not he became a passenger under the terms of the policy is for you to determine.

"You are instructed that if you find from the evidence that the insured, Walter John Aschenbrenner, attempted on the 9th day of November,

1931, to get on board a public conveyance provided by a common carrier for passenger service and that at the time he made such attempt he held a ticket entitling him, by virtue of its issuance to him by such common carrier, to ride as a passenger upon said conveyance, and that at the time he attempted to get on board said conveyance the conveyance was in motion and that he did, while the conveyance was in motion, actually get on board the same by reason of his lifting himself upon the steps and standing thereon with both of his feet upon a step of said conveyance while the same was in motion and holding with one hand to a hand rail attached to said [34] conveyance for the purpose of enabling passengers to lift themselves to the step of said conveyance for the purpose of entering the same, and that the said insured did, while the said conveyance was in motion, actually stand with both feet upon a step of the conveyance and hold to said hand rail with one hand, and that while he was so standing and holding he was thrown from the said step, either by reason of the increased motion of said conveyance or by being struck or jostled by another person attempting to get on board said conveyance, and that by reason of being so thrown he was hurled to the ground and thereupon and thereby suffered injuries from which he shortly died, then I instruct you that he was a passenger upon said conveyance at the time he was hurled therefrom and your verdict must be in favor of the plaintiff in the sum of $15,000.

"You are further instructed that the question of negligence of Walter John Aschenbrenner in getting on board the said conveyance is not at all concerned in this case and that you are not to consider in any respect whether or not the said Walter John Aschenbrenner was negligent in the manner in which he got on board the step of said conveyance, if you find that he did get on board thereof and of said conveyance, as a passenger thereon.

"I instruct you that under the provisions of paragraph 9 of special provisions of the insurance contract in this case it is provided:

> "'Immediate payment of Indemnity 9. All indemnities provided in this policy for loss, other than that of time, on account of disability, will be paid immediately after receipt of due proof.'

And I instruct you that under the above quoted provision of [35] the contract of insurance in this case the plaintiff is entitled to interest from and after the time of delivery of proof of loss, which time is set forth in the complaint herein as the 9th day of November, 1931, and which allegation of the complaint is admitted by the defendant. You will therefore, in the event that you render judgment in favor of the plaintiff in this action, include interest at seven per cent from and after November 9th, 1931.

"Your verdict must be unanimous."

Said charge of the court above set forth comprises all the instructions given to the jury in said cause.

That prior to the close of the evidence the defendant submitted to the court a list of written instructions and requested that the court give said instructions to the jury. Following is an exact copy of the instructions so submitted and requested to be given:

Number 2. Before the plaintiff can recover under the double indemnity provision of the policy here, she must have proven by preponderance of evidence that the decedent, Walter John Aschenbrenner, was a passenger on the train which he tried to board at the time of the accident. It is not enough for the plaintiff to show that the decedent, Walter John Aschenbrenner was on the steps or on the platform; she must go further and show by a preponderance of the evidence that he was on the steps or on the platform as a passenger. If he was not a passenger at the time of his injuries, regardless of where you believe him to have been, the plaintiff is entitled to your verdict only for the amount of the single indemnity provided under the policy, and as to the claim for the double indemnity thereunder the defendant, United States Fidelity & Guaranty Company, is entitled to your verdict.

Number 4. You are instructed that one who attempts to [36] board a moving train, intending to become a passenger thereon, does not become

such passenger until he has actually boarded such train and reached a place of safety thereon. If in the course of boarding a moving train he slips or stumbles or falls and is injured in the course of said slipping or stumbling or falling, he has not become in contemplation of law, a passenger on the train.

Number 5. Before one can become a passenger upon a passenger train there must have been a contract of carriage entered into between him and the railroad company. In other words, he must have offered to become a passenger and the railroad company must have accepted him as such, or the railroad company must have offered to receive him as a passenger and he must have accepted such invitation, and further must actually have become such passenger before such offer on the part of the railroad company is withdrawn. It is not necessary that he should have been asked expressly by the railroad company to become a passenger. The invitation may be implied. There is an implied invitation on the part of the railroad company to all persons who have either bought a ticket, or have the money to pay their fare, and who are not for some other reason not acceptable as a passenger, to become such passenger by boarding its trains at regular stations provided by the company, or other regular stops which the railroad company makes to take on passengers. However, this invitations continues only so long as the train is at rest. As soon as the train commences to move the

invitation is withdrawn and a person who is in the act of boarding a train which has commenced to move before he attempts to board it is, therefore, not a passenger, and does not become a passenger until any peril or hazard accompanying the act of boarding has been passed and the person boarding a moving train has reached a point of safety thereon. If, between the time the boarding is attempted [37] and the time a point of safety is reached thereon, he stumbles, slips or falls, and as a consequence of said stumbling, slipping or falling does not reach a point of safety upon the train then he has not become a passenger by his attempt to board such train.

Number 6. If you find, therefore, in this case that the train which the decedent, Walter John Aschenbrenner, was attempting to board was in motion at the time of attempting to board it, and if you further find that the decedent, Walter John Aschenbrenner, had not gained a point of safety on said train before he fell, then I instruct you that he was not a passenger thereon, and your verdict in this case can be for the plaintiff only in the amount of $7,500 and no more.

Number 7. If you believe that the decedent fell or slipped or stumbled while in the act of boarding the train, and if you further believe that the train at the time he first tried to board it was moving, then I instruct you that he was never a passenger thereon and that your verdict can be for the plaintiff in this case for $7,500 and no more.

Number 8. You are instructed that the act of boarding a train continues until the person boarding it is safely thereon, and if before he is safely thereon he slips or falls or stumbles off the train he has not become a passenger thereon; and if you believe that the decedent, Walter John Aschenbrenner had slipped or stumbled or fallen while he was boarding the train, then he was not a passenger on the train, and your verdict will be for the plaintiff in this action for the sum of $7,500 and no more.

That the said court failed and refused to give to the jury said instructions as requested by defendant or any part of any of them, and to said failure and refusal the defendant, in the presence of the jury and before they retired to deliber- [38] ate upon their verdict, excepted to the ruling of the court refusing to give and read to the jury instructions numbered 2, 4, 5, 6, 7, and 8, requested by the defendant.

The jury thereupon retired to consider their verdict, and thereupon and thereafter and on the 23rd day of November, 1932, the jury rendered a verdict for the plaintiff and against the defendant in the sum of $15,000.00, of which the following is a copy:

> "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Fifteen thousand Dollars and interest at 7% from and after Nov. 9, 1931.
>
> $15,000.00
>
> FRANK A. BOGART, Foreman."

And thereafter and on said day judgment was duly rendered by said court upon said verdict in favor of the plaintiff and against the defendant in the amount of Fifteen thousand dollars, together with interest thereon from and after November 9, 1931.

For as much as the matters above set forth do not fully appear of record the defendant tenders this its Bill of Exceptions and prays that the same may be signed and approved by the judge of this court.

Dated, February 14th, 1933.

HORACE W. B. SMITH,
GEO. A. WORK,
Attorneys for Defendant
and Appellant.

The foregoing bill of exceptions was filed on the 14th day of February, 1933, within the time allowed for filing the bill of exceptions, as said time was duly extended by stipulation of the parties extending time to February 16, 1933, said stipulations having been made and filed in the November term of said court, and the said bill of exceptions having been filed before the expiration of the term thereof. Said bill [39] contains all the evidence given and proceedings had upon the trial of this action, and is in all respects correct, and is hereby approved allowed and settled and made a part of the record herein.

Dated, February 14th, 1933.

A. F. ST. SURE,
United States District Judge for the Northern District of California, Southern Division.

Service of a copy of the above bill of exceptions is hereby acknowledged this 14th day of February, 1933.

WRIGHT, WRIGHT & LARSON,
Attorneys for Plaintiff and Appellee.

[Endorsed]: Filed Feb. 14, 1933. Walter B. Maling, Clerk. [40]

(Title of Court and Cause.)

PETITION FOR APPEAL.

To the Honorable A. F. St. Sure, Judge of the United States District Court.

United States Fidelity & Guaranty Company, a corporation, your petitioner, who is the defendant in the above entitled cause, prays that it may be permitted to take an appeal from the judgment entered in the above cause on the 23rd day of November, 1932, to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herewith, and your petitioner desires that said appeal shall operate as a supersedeas and, therefore, prays that an order be made fixing the amount of security

which said defendant shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this court be suspended and stayed until the determination of said appeal by the said United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated January 20, 1933.

HORACE W. B. SMITH,
GEO. A. WORK,
Attorneys for Defendant.

Due receipt of a copy of the within petition for appeal is hereby admitted this 20th day of January, 1933.

WRIGHT & WRIGHT & LARSON,
Attorneys for Plaintiff.

(Endorsed): Filed Jan. 21, 1933. [41]

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Comes now the United States Fidelity & Guaranty Company, a corporation, defendant and appellant in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause, from the judgment of this court entered on the 23rd day of November, 1932:

1. The trial court erred in denying defendant and appellant's motion for a directed verdict and in

refusing to direct the jury to render its verdict in favor of the defendant as to the double indemnity claim of the plaintiff under the policy of insurance involved in this action.

2. That the verdict of the jury is not sustained by the evidence.

3. That the court erred in refusing to give to the jury instructions requested by the defendant and appellant, numbered 2, 4, 5, 6, 7 and 8, which said instructions were duly requested of the court to be given to the jury and which request was refused, and which refusal was duly excepted to by the defendant in the presence of and before the retirement of the jury to deliberate upon its verdict. The said instructions are as follows:

"Number 2. Before the plaintiff can recover under the double indemnity provision of the policy here, she must have proven by preponderance of evidence that the decedent, Walter John Aschenbrenner, was a passenger on the train which he tried to board at the time of the accident. It is not enough for the plaintiff to show that the decedent, Walter John Aschenbrenner, was on the steps or on the platform; she must go further and show by a preponderance of the evidence [42] that he was on the steps or on the platform as a passenger. If he was not a passenger at the time of his injuries, regardless of where you believe him to have been, the plaintiff is entitled to your verdict only for the amount of the single indemnity provided under the

policy, and as to the claim for the double indemnity thereunder the defendant, United States Fidelity & Guaranty Company, is entitled to your verdict.

"Number 4. You are instructed that one who attempts to board a moving train, intending to become a passenger thereon, does not become such passenger until he has actually boarded such train and reached a place of safety thereon. If in the course of boarding a moving train he slips or stumbles or falls and is injured in the course of said slipping or stumbling or falling, he has not become in contemplation of law, a passenger on the train.

"Number 5. Before one can become a passenger upon a passenger train there must have been a contract of carriage entered into between him and the railroad company. In other words, he must have offered to become a passenger and the railroad company must have offered to receive him as a passenger and he must have accepted such invitation, and further must actually have become such passenger before such offer on the part of the railroad company is withdrawn. It is not necessary that he should have been asked expressly by the railroad company to become a passenger. The invitation may be implied. There is an implied invitation on the part of the railroad company to all persons who have either bought a ticket, or have the money to pay their fare, and who are not for some other reason not acceptable as a passenger, to become such passenger by boarding its trains at regular

stations provided by the company, or other regular stops which the railroad company makes to take on passengers. However, this invitation continues only so long as the train is at rest. As soon as the train commences to move the invitation is withdrawn [43] and a person who is in the act of boarding a train which has commenced to move before he attempts to board it is, therefore, not a passenger, and does not become a passenger until any peril or hazard accompanying the act of boarding has been passed and the person boarding a moving train has reached a point of safety thereon. If, between the time the boarding is attempted and the time a point of safety is reached thereon, he stumbles, slips or falls, and as a consequence of said stumbling, slipping or falling does not reach a point of safety upon the train, then he has not become a passenger by his attempt to board such train.

"Number 6. If you find, therefore, in this case that the train which the decedent, Walter John Aschenbrenner, was attempting to board was in motion at the time of attempting to board it, and if you further find that the decedent, Walter John Aschenbrenner, had not gained a point of safety on said train before he fell, then I instruct you that he was not a passenger thereon, and your verdict in this case can be for the plaintiff only in the amount of $7500 and no more.

"Number 7. If you believe that the decedent fell or slipped or stumbled while in the act of boarding the train, and if you further believe that the train

at the time he first tried to board it was moving, then I instruct you that he was never a passenger thereon and that your verdict can be for the plaintiff in this case of $7500 and no more.

"Number 8. You are instructed that the act of boarding a train continues until the person boarding it is safely thereon, and if before he is safely thereon he slips or falls or stumbles off the train he has not become a passenger thereon; and if you believe that the decedent, Walter John Aschenbrenner, had slipped, or stumbled, or fallen while he was boarding the train then he was not a passenger on the train, and your verdict will be for the plaintiff in this [44] action for the sum of $7500 and no more."

WHEREFORE, defendant prays that the said judgment may be reversed and for such other and further relief as to the court may seem just and proper.

HORACE W. SMITH,
GEO. A. WORK,
Attorneys for Defendant
and Appellant.

Due receipt of a copy of the within Assignment of Errors is hereby admitted this 20th day of January, 1933.

WRIGHT & WRIGHT & LARSON,
Attorney for Plaintiff.

(Endorsed): Filed Jan. 21, 1933. [45]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL WITH SUPERSEDEAS.

The petition of United States Fidelity & Guaranty Company, a corporation, defendant in the above entitled cause, for an appeal from the final judgment is hereby granted and the appeal is allowed, and upon petitioner filing a bond in the sum of $22,500.00 with sufficient sureties, and conditioned as required by law, the same shall operate as a supersedeas of the judgment made and entered in the above cause, and shall suspend and stay all further proceedings in this court until the termination of said appeal by the Circuit Court of Appeals in and for the Ninth Circuit.

Dated, January 21, 1933.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed Jan. 21, 1933. [46]

[Title of Court and Cause.]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND—BALTIMORE.

KNOW ALL MEN BY THESE PRESENTS:

That Fidelity and Deposit Company of Maryland, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and duly licensed to transact business in

the State of California, is held and firmly bound unto Alice Aschenbrenner, plaintiff in the above entitled case, in the sum of Twenty-two Thousand Five Hundred and no/100 ($22,500.00) Dollars, to be paid unto Alice Aschenbrenner for which payment, well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

SIGNED, sealed and dated this 23rd day of January, A. D. 1933.

THE CONDITION OF THIS OBLIGATION IS SUCH, that

WHEREAS, the United States Fidelity and Guaranty Company, a Corporation, defendant herein has taken or is about to take an appeal to the United States Circuit Court of Appeals, Ninth Circuit, from a judgment made, entered and rendered against it on November 23, 1932 for the sum of Fifteen Thousand and no/100 ($15,000.00) Dollars, besides interest. [47]

NOW, THEREFORE, the condition of the above obligation is such that if the said United States Fidelity and Guaranty Company shall prosecute its said appeal to effect and answer all costs which may be adjudged if it fails to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

And it is further hereby expressly agreed that in case of a breach of any condition of the above obligation and this bond, the said Southern Division

of the United States District Court for the Northern District of California, may upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the above entitled case therein pending to ascertain the amount which said Fidelity and Deposit Company of Maryland is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[Corporate Seal] By Guertin Carroll,
Attorney in Fact.

Attest:
C. A. Bevans,
Agent.

The premium charged for this bond is $300.00 Dollars per annum.

Approved: A. F. St. Sure, District Judge, Jan. 23, 1933.

State of California,
City and County of San Francisco.—ss.

On this 23rd day of January, A. D. 1933, before me, Emily K. McCorry, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Guertin Carroll, Attorney-in-Fact, and C. A. Bevans, Agent, of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the persons who executed the within instrument on

behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the Attorney-in-Fact and Agent respectively of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-Fact and Agent respectively.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

[Notarial Seal] EMILY K. McCORRY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 23, 1933. [48]

[Title of Court and Cause.]

PRAECIPE ON APPEAL.

To the Clerk of the above entitled Court:

You are requested to take a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:

Judgment roll.

Petition for appeal.

Order allowing appeal with supersedeas.

Citation on appeal.

Assignment of errors.

Bond for supersedeas on appeal.

Bill of exceptions.

This praecipe on appeal and admission of service thereof.

Dated, March 2nd, 1933.

HORACE W. B. SMITH,
GEO. A. WORK,
Attorneys for Defendant and Appellant.

[Endorsed]: Filed Mar. 3, 1933. [49]

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE.

State of California,
City and County of San Francisco.—ss.

Berniece Melbostad, being first duly sworn, deposes and says:

That she is a citizen of the United States, over the age of eighteen years, and not a party to the within entitled action; that she personally served a copy of the praecipe on appeal in the within action upon the attorneys for the plaintiff, Wright

& Wright & Larson, by leaving said copy of said praecipe on appeal with the secretary of said Wright & Wright & Larson at their offices in the Mills Building, San Francisco, California, on the 3rd day of March, 1933, between the hours of 9:30 and 5:00 P. M. of said day.

BERNIECE MELBOSTAD.

Subscribed and sworn to before me, this 3rd day of March, 1933.

[Seal] MARIE FORMAN.

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 4, 1933. [50]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 50 pages, numbered from 1 to 50, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Alice Aschenbrenner v. United States Fidelity and Guaranty Company, a corporation, No. 19,198-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on

appeal is the sum of $20.55 and that the said amount has been paid to me by the attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 6th day of March A. D. 1933.

[Seal] WALTER B. MALING,
B. E. O'HARA,
Deputy Clerk. [51]

[Title of Court and Cause.]

CITATION.

To the above named plaintiff, and to her attorneys of record, Wright & Wright & Larson and John Ralph Wilson, Esqs.:

YOU ARE HEREBY CITED and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, thirty (30) days from and after the date this citation bears date, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Southern Division of the Northern District of California, wherein United States Fidelity & Guaranty Company, the defendant, is appellant, and Alice Aschenbrenner, the plaintiff, is appellee; to show cause, if any there be, why the judgment rendered against the said defendant and appellant, as in said appeal mentioned, should not

be corrected and why speedy justice should not be done the parties in that behalf.

WITNESS: The Honorable A. F. St. Sure, Judge of the District Court of the United States for the Northern District of California, this 15th day of February, 1933.

[Seal] A. F. ST. SURE,
Judge of the District Court of the United States for the Northern District of California.

Receipt of a copy of the above citation is hereby acknowledged this 16th day of February, 1933.

JOHN RALPH WILSON,
WRIGHT & WRIGHT & LARSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1933. [52]

[Endorsed]: No. 7110. United States Circuit Court of Appeals for the Ninth Circuit. United States Fidelity & Guaranty Company, a Corporation, Appellant, v. Alice Aschenbrenner, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed March 15, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7110

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,

Appellant,

vs.

ALICE ASCHENBRENNER,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the thirteenth day of June in the year of our Lord One Thousand Nine Hundred and Thirty-three.—

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

No. 7110

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,

Appellant,

vs.

ALICE ASCHENBRENNER,

Appellee.

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. George A. Work, Counsel for the appellant, and by Mr. Allen G. Wright, counsel for the appellee and submitted to the court for consideration and decision, with leave to counsel for appellant to file a reply brief in three days.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the Twenty Sixth day of June in the year of our Lord One Thousand Nine Hundred and Thirty Three.

Present: The Honorable WILLIAM H. SAWTELLE, Circuit Judge, Presiding, Honorable FRANCIS A. GARRECHT, Circuit Judge.

No. 7110

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in the above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Before: WILBUR, SAWTELLE and GARRECHT, Circuit Judges.

SAWTELLE, Circuit Judge:

Except in minor respects, the facts in this case are undisputed. In the following summary, we are adopting the interpretation of the facts most favorable to the appellee.

The appellant, issued a policy of insurance under which Walter Aschenbrenner, hereinafter referred to as the decedent, was the assured, and the appellee, who was the plaintiff below, was the beneficiary. The policy provides for a payment of $7,500 as the principal sum against loss of life resulting directly and independently of all other causes from accidental bodily injuries.

The policy further provides for double indemnity payable as follows:

> "Schedule V. Double Indemnities.
>
> "The amounts payable in all the foregoing schedules shall be doubled if 'such injury' is sustained by the insured,
>
> "(1) While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service."

The only issue in this case is whether the double indemnity or only the single indemnity is payable under the facts. The appellant conceded at the trial that it was liable for the single indemnity, the accidental death being established. The only question in the case is whether at the time of the decedent's fatal injuries, he was a "passenger" on or in a common carrier, within the terms of the policy.

About 7:35 in the morning of October 29, 1931, the decedent and a friend, a Mr. Ishem, arrived at the Southern Pacific Broadway Station in Burlingame, California, in a taxicab. The cab drew up at a distance of between 25 to 40 feet from a train, which was just commencing to pull out of the station. The decedent paused a moment, fumbling for money with which to pay the taxicab driver, who told him to go on and pay him that night. Whereupon, the decedent and his companion commenced running for the train across the station platform.

The train was headed north, bound for San Francisco. The two men ran somewhat on a diagonal toward the track. Ishem was on the left and a little ahead. He did not attempt to board the train, but stopped as he came to it.

When the two men reached the train, it was moving at a rate of speed estimated at from seven to ten miles an hour.

The decedent was running for the front platform of the second to the last car on the train, and Ishem was running for the rear platform of the third car from the rear of the train. The vestibule doors were open, because, according to a brakeman who testified,

"the train was not out of the station". Another witness testified that the vestibule doors were never closed.

The decedent jumped upon the lower step, his right hand grasping the handrail, and while standing there he was carried to where Ishem stood.

The cause of the accident, as indicated by the testimony of three of the witnesses, was that as the train moved forward, carrying the decedent to the point where Ishem stood, the decedent's overcoat or the small part of the decedent's body outside of the vestibule, brushed against Ishem and caused the decedent to loose his hold and fall. From the time he jumped on the train until he was carried to the point where Ishem stood, the decedent was standing with both feet on the lower step of the car and inside the vestibule, except for a small part of his body, which was outside. The decedent was carrying his overcoat over his left arm and a brief case in his right hand. After he was on the step he "apparently started to change hands with his overcoat or brief case".

The train proceeded about twenty feet when the decedent fell. The cause of his fall is not clear. While, as we have seen, three witnesses said that the decedent brushed against Ishem, the remaining witnesses did not know what caused him to fall.

The decedent swung out from the train, holding only with his right hand, was thrown against the side of the car, and fell between the platform and the track, and was crushed, dying at a hospital a few hours later.

Both sides made timely motions for a directed verdict in their respective favor. All such motions were denied, exceptions were duly taken, and the case was submitted to the jury. The verdict was for a double indemnity, or $15,000. From a judgment rendered on that verdict, the defendant company appeals.

While there are three assignments of error, our decision upon the first is determinative of the case. That assignment is to the effect that the trial court erred in denying the appellant's motion for a directed verdict as to the appellee's claim for double indemnity. The correctness of that assignment, in turn, depends upon whether or not the decedent was a "passenger" on the train at the time of his death; or if, as a matter of law from the facts in the case, interpreted so as to give the appellee the benefit of every substantial conflict, the decedent was not a passenger at the time he fell, then clearly the trial court should have directed a verdict for the appellant on the double indemnity feature of the case.

The adjudicated cases dealing with the precise point involved are not numerous, particularly those decided by Federal courts. Furthermore, there is some conflict in the authorities. For these reasons, we will quote frequently and fully from the leading cases in point, instead of following our usual practice of quoting only a few authorities and citing the rest.

It may be conceded at the outset that a policy is to be construed strictly against the insurance company and liberally in favor of the insured. Never-

theless, the Supreme Court of the United States has definitely fixed the boundaries of this liberality in favor of the insured. In Ripley v. Insurance Co., 83 U. S. 336, 338, Mr. Chief Justice Chase, in dealing with an accident insurance policy, said:

> "The contract must receive the construction which the language used fairly warrants. What was the understanding of the parties, or, rather, what understanding must naturally have been derived from the language used?"

Applicable here, also, is the language of the St. Louis Court of Appeals in Mitchell v. German Commercial Accident Co., 161 S. W. 362, 363-364:

> "Though it be that the language of insurance contracts is to be construed most favorably to the insured and against the insurer with a view to effectuating the insurance, and that all doubtful language is to be resolved in favor of the insured, the courts are not authorized to seize upon certain and definite covenants expressed in plain English with violent hands, and distort them so as to include a risk clearly excluded by the insurance contract."

The appellee contends that, in a case of this kind, the court should construe the word "passenger" in its "plain, ordinary, and popular sense". During the oral argument before this court, counsel for the appellee suggested the dictionary definition of "passenger", such as "a person who travels in a public conveyance", as applicable here. But such a definition would include members of a train crew, who, even in

the "popular" sense, are not considered "passengers".

It must be remembered, after all, that the policy in question is a legal document, solemnly executed, and that such document is being construed in a court of law. We can see no reason why the parties to this contract did not intend that the terms used should have their usual *legal* signification. Indeed, both reason and authority point to the opposite conclusion.

The term "passenger" is used primarily in contracts, whether express or implied, between carriers and those who are transported by them. It would seem, therefore, that, for the proper definition of the term "passenger", we should turn to the law of carriers.

This suggestion, however, has been vigorously resisted by counsel for the appellee, both in the brief and in the oral argument. Counsel makes the somewhat unusual contention that "passenger" means one thing in the law of carriers, and quite another in the law of insurance.

We cannot subscribe to this view, for we believe that it finds support neither in logic nor in authority. Both legal reasoning and legal language would become hopelessly obscure and confused if definitions, instead of being in truth "definite", could thus be shifted about.

We believe that the rule is properly expounded in Cooley's Briefs on Insurance, 2d ed., vol. 6, page 5590:

> "Policies usually provide for the payment of double indemnity if the injury causing disability

or death is received under certain specified conditions. One of the most common provisions is one that provides for double indemnity if the injury is received while riding as a passenger in any conveyance intended for the transportation of passengers. *In determining who is a passenger within such a clause, the same rules are applied as would govern if the action was* [were] *against the carrier.*" (Italics indicate bold-faced type in the text.)

This rule was recognized in the case of Travelers' Ins. Co. v. Austin, 42 S. E. 522, 524, in which the Court of Georgia said:

> "With this in view, the true test to be applied to determine whether one injured in a railroad accident can recover from an insurance company double indemnity is to inquire whether, presuming that a right of action exists against the railroad company, the plaintiff would be entitled to sue that company in the capacity of a passenger or an employe."

In that case, the court held that the decedent was solely an employee and not a passenger of the company.

In Berliner v. Travelers' Ins. Co., 121 Cal. 451, 465, the court said:

> "These were cases that involved the liability of the railroad company for injury to its passengers while rightfully upon the engine, and were not cases of accident insurance; but the

word 'passenger' as here used is evidently i
tended to designate the character or relati
the insured sustained to the proprietor of t
conveyance, and are therefore in point."

In Quinn v. New York Life Ins. Co., 195 N. W
427, 428, the Supreme Court of Michigan said:

"It is further contended that, as betwe
plaintiff and the defendant, a different ru
should be applied than between plaintiff and t
street car company on the question whether t
insured was a passenger at the moment he wa
struck.

"Considering the last question, we are unabl
to see why any distinction should be made be
tween the insurance company as a defendan
and the street car company. At the time th
provision, 'while traveling as a passenger on
street car', etc., was adopted by defendant an
made part of its contract, that phrase had wel
understood meaning in the law, and it is reason
able to suppose that the meaning given to it b
the courts was well understood and considere
by defendant before making it a part of it
double liability, and it was well known by bot
parties when the contract was made that, shoul
the parties afterwards disagree upon the ques
tion of liability, the courts would probably giv
the language the same construction they ha
given it in cases where transportation com
panies were defendants. We cannot agree wit
defendant in this suggestion."

It is true that the decisions in both the Berliner and the Quinn case, supra, were adverse to the insurance company. In the Berliner case, the policy excluded recovery for an accident while the insured was "in or on any such conveyance not provided for transportation of passengers". The court held that the decedent, though riding on the locomotive, at the invitation of an official of the railroad, at the time of the accident, was, within the terms of the policy, a passenger, since "the locomotive is part of the 'conveyance' provided for the transportation of passengers upon a railroad". In the Quinn case, the decedent was struck down by a taxicab while he was stepping off, or after he had stepped off, a street car that was slowing down to a stop. The court there held that, since there was testimony to "justify an inference by the jury that Quinn was struck while in the act of alighting, and before he had safely alighted onto the pavement", he was a passenger, and that therefore his widow could recover under the policy. The policy in that case covered death "while traveling as a passenger on a street car", etc.

The facts of both the Berliner and the Quinn cases are easily distinguishable from those at bar. Hence the judgments there rendered against the insurance companies do not detract from the authority of those two cases for the general proposition which they lay down; namely, that, for the definition of the term "passenger", the courts must have recourse to the law of carriers.

To that law we now turn.

In the language of Judge Sanborn in the case of Purple v. Union Pac. R. Co. (C. C. A.), 114 F. 123, 126:

> "A contract is indispensable to the relation of carrier and passenger. The minds of the parties must meet upon the agreement that the carrier will transport and the passenger will pay for transportation, 'in the absence of a specific agreement or permission by the proper officer of the transportation company that the latter will carry the passenger without compensation. This contract of carriage may, it is true, be express or implied, but if it does not exist in either form the relation of carrier and passenger cannot have been created. An implied agreement to pay fare, and hence the relation of carrier and passenger, undoubtedly arises where one enters a passenger car and rides towards his destination."

See also, Fels v. St. Louis & S. Ry. Co. (C. C. A. 8), 275 F. 881-3; Pere Marquette R. Co. v. Strange (S. Ct., Ind.), 84 N. E. 819, 821.

Like all other contracts, the contract of carriage arises through an offer or invitation, express or implied, and an acceptance, express or implied. When a train is stationary at some place where it is the custom of the railroad to take on passengers, there is an implied invitation to the general public to avail itself of the company's transportation facilities by boarding the train.

But, when the train commences to move, that invitation is withdrawn, for it may no longer with physical safety be accepted.

In Tompkins v. Portland Ry. etc. Co., 77 Ore. 174-?, 150 Pac. 758, the late Justice Bean, a jurist held in high esteem in this circuit, thus formulated the rule:

> "There is little controversy on the question that the stopping of a street-car at the place where passengers are usually received constitutes an invitation to the public to board and become passengers. This invitation continues while the car is standing. The starting of the car is a withdrawal of the invitation."

In Palmer v. Willamette Valley Southern Ry. Co., 171 Pac. 1169, 1172, the Supreme Court of Oregon again recognized the above principle, in the following language:

> "While waiting at the depot a standing train serves as an invitation to all intending passengers to board it, and the invitation carries with it an assurance that the passengers may board the train in safety. [Case cited.] But starting the train ordinarily operates as a withdrawal of the invitation. [Authorities cited.]"

Both the rule and the reason therefor are well stated in White's Personal Injuries on Railroads, Vol. II, at §§556 and 783, pages 838 and 1176:

> "Nor does a person become a passenger, who gets on a train after it has started to move, until

he actually reaches a place of safety inside the car and no action can be maintained by his representatives, if he falls off the platform and is killed, in attempting to get on such train.

* * * * * * *

"Boarding or attempting to board a moving train is an improper and dangerous act *and in legal contemplation, the invitation of the railroad company is withdrawn the very instant the train begins to move.* If there is no evidence, therefore, of any invitation on the part of the train-employees, for the passenger to board the moving train, or nothing to show that they knew of the passenger's attempt and ratified it, there can generally be no recovery for an injury received in such an attempt." (Italics our own.)

The rule has been recognized in the Third Circuit in the case of Trapnell v. Hines (C. C. A.), 268 F. 504, 506, in which Judge Woolley used the following language:

"The plaintiff did not avail himself of these instrumentalities of safety but boarded the train on the wrong side after the train had started; that is, on a side at which the carrier had made no preparation to receive passengers and *at a time when the carrier had, by starting the train, withdrawn his invitation to passengers.*" (Italics our own.)

In Illinois Cent. R. Co. v. Cotter, 103 S. W. 279, 280, the Court of Appeals of Kentucky said:

"One who attempts to jump upon a rapidly moving train does not become a passenger upon the train, although he may have a ticket for it. Dodge v. R. R. Co., 148 Mass. 209, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541; Baltimore Traction Co. v. State, 78 Md. 409, 28 Atl. 397; Hutchinson on Carriers, §249; 3 Thompson on Negligence, §2636."

A similar statement by the same court is to be found in Kentucky Highlands R. Co. v. Creal, 179 S. W. 417, 418, which cites the Cotter case, supra, and is published, with annotations, in L. R. A. 1916B, at pages 830-835.

Again, in Mathews v. Metropolitan St. Ry. Co., 137 S. W. 1003, 1005, the Kansas City Court of Appeals said:

"It is clear that the attempt of Mathews to board the car after it had left the usual stopping place, and was starting up the incline, did not create the relationship of passenger and carrier."

The Supreme Court of Missouri adopted this doctrine in the case of Schepers v. Union Depot R. Co., 29 S. W. 712, 714, where it said:

"It follows from what has been said that plaintiff did not become a passenger by a mere attempt on his part to board the car while in motion, as is declared by this instruction. There must have been some act on the part of the car-

rier indicating an acceptance. Stager v. Ry. Co., 119 Pa. St. 70, 12 Atl. 821."

See also, Lee v. Baker (Court of Civil Appeals, Texas), 251 S. W. 580; Schaefer v. St. Louis & S. Ry. Co. (S. Ct., Mo.), 30 S. W. 331-2; 4 R. C. L. §§489, 490, 493, pp. 1029-1033, 1036-1039.

But, as we have seen, although the intending passenger fails to become a passenger in fact and in law, by merely attempting to board a moving train, he does become a passenger when he reaches a place of safety. In the instant case, however, the event itself shows that decedent never reached a place of safety; else he would not have been killed! His position upon the lower step of the car was of so brief a duration, and his lack of equilibrium during that instant of time was so evident, that it would be paradoxical to say that the decedent had reached a place of safety at the time he fell off the car. His attempt to board that train and his fall therefrom were in reality parts of the same operation—an operation by which the decedent attempted, but unsuccessfully attempted, to attain the status of passenger.

It is true that the policy provides for double indemnity for injuries sustained while the insured is on the platform, steps or running board of a public conveyance. But the very same clause also provides that the insured is to be a *passenger* on such conveyance. Therefore, if the decedent had failed to reach the status of *passenger* when he fell off the

train, his beneficiary is not entitled to recover the double indemnity.

Emphasis upon the "place of safety" rule was given by the Supreme Court of Massachusetts in the case of Merrill v. Eastern R. Co., 1 N. E. 548, 550, where the decedent first had been traveling on the engine, but got off at a station and, after the train had started, got on the front platform of the front passenger car. He stood on the step of the platform, facing inward, and, *after the train had gone from a quarter to half a mile*, fell off and was killed. Of such a situation, the Supreme Court of Massachusetts said:

> "Then, supposing that his start upon the engine did not give a character to his subsequent relation to the defendant, and that the deceased was in the same position as if he had attempted to get on at East Salisbury for the first time, it is clear that when he attempted to get upon the moving train after it had started, he was outside of any implied invitation on the defendant's part, and did not at once acquire the rights of a passenger in the hands of a carrier. We may admit that if he had reached a place of safety, and seated himself inside the car, the bailment of his person to the defendant would have been accomplished, and that he would not have been prevented from asserting such rights because of the improper way of getting upon the train. But we think that he could not assert them until he had passed the danger which met him at the threshold, and had put himself

> in the proper place for the carriage of passengers."

See also, Horwitz v. Jefferson County Traction Co. (Court of Civil Appeals, Texas), 188 S. W. 26, 28.

The appellee insists that cases involving the liability of a carrier to its passengers should not be regarded as authority in the present litigation, which involves an insurance company. But the reason for the doctrine upon which we are here relying is the same, whether the case involves a carrier or an insurance company; namely, a person acquiring the full status of a passenger is known to occupy an extremely safe situation, while one who is attempting to board a moving train is in a precarious state.

The appellant suggests this reason in its brief, and the appellee has attempted to answer the point by a resort to satire and a quotation from Mark Twain. Nevertheless, this reason for the rule finds its sanction in the law.

Discussing the double indemnity clause in a connection not applicable here, Fuller, in his "Accident and Employers' Liability Insurance", Chapter 4, page 334, goes on to use language that does recognize the reason for the rule to which we are here adhering:

> "The theory of this clause is that the interior of a passenger car is a place of exceptional safety, and in view of the slight risk to one

> seated there, the insurance company can contract to pay a double indemnity in the event of injury or death."

It is true that the learned author was not there discussing a policy containing the terms that form part of the policy in the instant case; but his observations regarding the *reason* for the rule—namely, that a passenger is in an exceptionally safe situation—are in point here. The applicability of the rule itself to the instant case has been established, we believe, by the authorities already cited, which indicate *when* the status of passenger is acquired. Even under the present policy, as we have seen, the insured cannot recover unless he has in fact and in law acquired the status of passenger.

In Fuller's treatise, there is quoted as an annotation to this same Chapter 4, at pages 333-334, the case of Wallace v. Employers' Liability Assur. Corp., 26 Ont. L. Rep. 10, in which the court said:

> "It is common knowledge that the vast majority of street car accidents occur in connection with entering or leaving the car; injuries to those in or on the cars being limited to the rarer cases of collisions, or the car running off the track."

In Anable v. Fidelity & Casualty Co., 63 A. 92, 93, the Supreme Court of New Jersey said:

> "Nor is there any reason discoverable why the contract should not be construed in accordance with its plain language. The risk for which

> the defendant contracted to pay double insurance, was without doubt regarded as distinctly less hazardous than the single insurance risk. A passenger in a public conveyance who keeps himself within a car, or on a steamboat, is regarded as subjected to the slightest risk; while the act of getting on or off moving trains, involves a considerable degree of peril."

The Court of Errors and Appeals of New Jersey affirmed the foregoing case for the reasons stated in the opinion of the Supreme Court. 65 A. 1147.

The appellee insists that full force should be given to the words "platform, steps, or running board". In this contention, the appellee is quite correct. But equal force should be given to the words "while a passenger". If the appellee has not brought herself within *all* the conditions precedent to recovery under the policy, she cannot be awarded double indemnity.

For the foregoing reasons, we do not believe that the decedent was a "passenger" at the time he was killed, and that therefore the appellee is not entitled to double indemnity under the policy. The court below should have directed a verdict to that effect.

Accordingly, the judgment is reversed, and the case remanded with instructions to the District Court to enter a judgment for the appellee in the principal sum of $7,500 instead of $15,000. Interest at seven per cent. on said sum of $7,500 is to be allowed to the appellee from November 9, 1931.

Judgment reversed and remanded, with instructions.

[Endorsed]: Opinion. Filed June 26, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7110

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,

Appellant,

vs.

ALICE ASCHENBRENNER,

Appellee.

JUDGMENT.

UPON APPEAL from the District Court of the United States for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellant and against the appellee, and that

this cause be, and hereby is remanded to the sa
District Court with instructions to enter a jud
ment for appellee in the principal sum of $7,50
instead of $15,000. Interest at seven per cent. o
said sum of $7,500, is to be allowed to the appell
from November 9, 1931.

IT IS FURTHER ORDERED AND AD
JUDGED by this Court that the appellant recov
against the appellee for its costs herein expende
and have execution therefor.

[Endorsed]: Filed and entered June 26, 193
Paul P. O'Brien, Clerk.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday the Sixth day of September in the year of our Lord One Thousand Nine Hundred and Thirty-Three.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, presiding. Honorable WILLIAM H. SAWTELLE, Circuit Judge.

No. 7110

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING.

Upon consideration thereof, and by direction of the court, ORDERED petition of appellee, filed July 26, 1933, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Messrs. Wright, Wright & Larson, counsel for the appellee, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court

in the above cause be, and hereby is stayed to and including October 11, 1933; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR
United States Circuit Judge.

Dated: San Francisco, California,
September 7, 1933.

[Endorsed]: Filed Sep 7 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

APPLICATION TO STAY ISSUANCE OF MANDATE.

To the Circuit Court of Appeals for the Ninth Circuit:

Decision in the above entitled cause, denying the petition for a rehearing, was entered by this Court under date of September 6, 1933. Within the time allowed by law therefor and within thirty days from October 11, 1933, counsel for appellee proposes to petition the Supreme Court of the United States to grant a writ of certiorari to review the decision of this Court. An additional stay of the issuance of the mandate of this Court is requested to enable counsel to prepare the necessary petition and brief and to perfect arrangement for the Association of Washington counsel in the case. A stipulation by counsel for appellant consenting to such additional stay is filed herewith.

It is further requested that upon filing of the petition for certiorari issuance of its mandate by this Court be further stayed until disposition by the United States Supreme Court of the proceedings on certiorari.

Respectfully submitted,
RANDELL LARSON
Of Counsel for Appellee

It is stipulated that this application may be granted by this Court with the consent of appellant.

HORACE W. B. SMITH
GEO. A. WORK
Counsel for Appellant

Citations

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U. S. Constitution, 7th Amendment	3

Cases

Aetna Life Insurance Co. v. Davis, 191 Fed. 343	13
Bayles v. Travelers Ins. Co., 113 U. S. 316; 5 Sup. Ct. Rep. 494	10
Fidelity & Casualty Co. v. Morrison, 129 Ill. A. 360	13
Fidelity Title & Trust Co. v. DuBois Electric Co., 253 U. S. 212; 40 Sup. Ct. Rep. 514	4
Glynn v. Krippner (C. C. A. 8), 60 Fed. (2d) 406	4
Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452; 14 S. Ct. Rep. 379, at p. 381	13
London Guarantee & Accident Co. v. Ladd, 299 Fed. 562	11
Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167; 44 S. Ct. Rep. 90, at p. 91	13
Preferred Accident Ins. Co. v. Muir, 126 Fed. 926	12
Slocum v. New York Life Insurance Co., 228 U. S. 364; 33 Sup. Ct. Rep. 523	4, 9
Walker v. New Mexico & S. P. R. Co., 165 U. S. 593; 17 Sup. Ct. Rep. 421	10

Cases in Appendix

Hull v. Equitable Acc. Ass'n (Minn.), 42 N. W. 936	i
London Guarantee & Accident Co. v. Ladd (C. C. A. 6), 299 Fed. 562, at p. 563	ii
Preferred Acc. Ins. Co. v. Muir, 126 Fed. 926 (C. C. A. 3)	ii
Standard Life & Accident Ins. Co. v. McNulty, 157 Fed. 224 (C. C. A. 8)	i
Standard Life & Accident Ins. Co. v. Thornton, 100 Fed. 582 (C. C. A. 6)	i
Sawtelle v. Railway Pass. Assurance Co., 15 Blatchf. 216, 21 Fed. Cases 12,392	i

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No.

ALICE ASCHENBRENNER,
Petitioner,
vs.
UNITED STATES FIDELITY & GUARANTY CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of Alice Aschenbrenner, San Francisco, California, prays that a writ of certiorari issue to review the judgment of the Circuit

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Randell Larson of counsel for the appellee, and good cause therefor appearing,

IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including November 11th, 1933; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

WM. H. SAWTELLE
United States Circuit Judge

Dated, San Francisco, California
Sept. 28, 1933

[Endorsed]: Filed Sep. 28, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Cause and Number.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-eight (88) pages, numbered from and including 1 to and including 88, to be a full, true and correct copy of the entire record of the above entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco in the State of California, this 29th day of September, A. D. 1933.

[Seal] PAUL P. O'BRIEN,

Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 11, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.